Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

CITIZENS FOR BALANCED TRANSPORTATION, ET AL.,

Cross-Petitioners,

v.

CAROL M. BROWNER, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, ET AL.,

Cross-Respondents.

On Cross-Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

CROSS-PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the court of appeals erred by failing to remand to U.S. EPA its primary 24-hour national ambient air quality standard for PM2.5 because the agency failed to "articulate a satisfactory explanation for its action" when it set a standard that allows many thousands of premature deaths and other serious adverse health effects.

2. Whether the court of appeals erred by failing to remand to U.S. EPA its primary 24-hour national ambient air quality standard when the evidence adduced by the agency demonstrates that the standard will not protect public health with an adequate margin of safety as required by § 109(b)(1) of the Clean Air Act.

3. Whether the court of appeals erred by holding that U.S. EPA may establish secondary national ambient air quality standards for PM2.5 that fail to protect against all known or anticipated adverse effects on public welfare, including visibility.

RULE 29.6 DISCLOSURE, AND LIST OF PARTIES BELOW

Cross-Petitioners Citizens for Balanced Transportation, Richard Romero (on behalf of himself and his minor son, Richard Romero, Jr.), David Matusow, Brian McCarthy, James Bassage and Michael Gregory ("CBT") were petitioners in the court of appeals. CBT has no parent companies or nonwholly owned subsidiaries, and there is no parent or publicly held company owning stock in CBT.

The following were parties in one or both of the two consolidated proceedings addressed by the original petitions for certiorari (*American Trucking Assns. v. USEPA*, D.C. Cir. No. 97-1440 and consolidated cases; and *American Trucking Assns. v. USEPA*, D.C. Cir. No. 97-1441 and consolidated cases):

Alliance of Automobile Manufacturers (formerly American Automobile Manufacturers Association)
American Farm Bureau Federation
American Forest & Paper Association
American Iron and Steel Institute
American Lung Association
American Petroleum Institute
American Portland Cement Alliance
American Public Power Association
American Road and Transportation Builders Association
American Trucking Associations, Inc.
Appalachian Power Company
Atlantic City Electric Company
Baltimore Gas and Electric Company
James Bassage
Burns Motor Freight, Inc.
Carolina Power & Light Company
Centerior Energy Corporation

RULE 29.6 DISCLOSURE, AND LIST OF PARTIES BELOW – Continued

Central and South West Services, Inc.
Central Hudson Gas & Electric Corporation
Central Illinois Light Company
Central Illinois Public Service Company
Central Power and Light Company
Chamber of Commerce of the United States
Chemical Manufacturers Association
CINergy Corporation
Citizens for Balanced Transportation
Cleveland Electric Illuminating Company
Columbus Southern Power Company
ComEd Company
Consumers Energy Company
Dayton Power & Light Company
Delmarva Power & Light Company
Detroit Edison Company
Duke Energy Company
Duquesne Light Company
Edison Electric Institute
Equipment Manufacturers Institute
FirstEnergy Corporation (A merger of Centerior Energy Corporation and Ohio Edison Company)
Florida Power Corporation
Garner Trucking, Inc.
Genie Trucking Line, Inc.
Gloucester Company, Inc.
Michael Gregory
Idaho Mining Association
Illinois Power Company
Indiana Michigan Power Company
Indianapolis Power & Light Company
Jacksonville Electric Authority
Judy's Bakery, Inc.
Kansas City Power & Light Company
Kennecott Energy and Coal Company

RULE 29.6 DISCLOSURE, AND LIST OF PARTIES BELOW – Continued

Kennecott Holdings Corporation
Kennecott Services Company
Kentucky Power Company
Kentucky Utilities Company
Louisville Gas and Electric Company
Madison Gas and Electric Company
Commonwealth of Massachusetts
David Matusow
Brian McCarthy
Meridian Gold Company
State of Michigan
Midwest Ozone Group
Minnesota Power
Monongahela Power Company
Montaup Electric Company
National Association of Home Builders
National Association of Manufacturers
National Automobile Dealers Association
National Coalition of Petroleum Retailers
National Indian Business Association
National Mining Association
National Paint and Coatings Association
National Petrochemical & Refiners Association
National Rural Electric Cooperative Association
National Small Business United
National Stone Association
Nevada Mining Association
State of New Jersey
Newmont Gold Company
Niagara Mohawk Power Corporation
Non-Ferrous Founders' Society
Northern Indiana Public Service Company
Oglethorpe Power Corporation
State of Ohio
Ohio Edison Company

RULE 29.6 DISCLOSURE, AND LIST OF PARTIES BELOW – Continued

Ohio Mining and Reclamation Association
Ohio Power Company
Ohio Valley Electric Corporation
Oklahoma Gas & Electric Company
Otter Tail Power Company
PacifiCorp
Pennsylvania Power & Light Company
Phoenix Cement Company
Plains Electric Generation & Transmission Cooperative, Inc.
Potomac Edison Company
Potomac Electric Power Company
PP&L Resources
Public Service Company of New Mexico
Public Service Company of Oklahoma
Richard Romero
Salt River Project Agricultural Improvement and Power District
Small Business Survival Committee
South Carolina Electric & Gas Company
Southern Company
Southwestern Electric Power Company
Tampa Electric Company
Texas Gas Transmission Corporation
Toledo Edison Company
Union Electric Company
United Mine Workers of America, AFL-CIO
United States Environmental Protection Agency
Virginia Power
West Penn Power Company
West Texas Utilities Company
West Virginia Chamber of Commerce
State of West Virginia
Western Fuels Association
Wisconsin Electric Power Company

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CROSS-PETITION FOR WRIT OF CERTIORARI

Cross-petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

DECISIONS BELOW

The decision of the court of appeals is published at *American Trucking Assns. v. USEPA*, 175 F.3d 1027 (D.C. Cir. 1999), Mass. App. 1,[1] *rehearing granted in part, denied in part*, 195 F.3d 4 (D.C. Cir. 1999), Mass. App. 64. The agency rule at issue in this cross-petition is published at 62 Fed. Reg. 38,652 (July 18, 1997).

BASIS FOR JURISDICTION

The date the judgment or order sought to be reviewed was entered. The D.C. Circuit's judgment or order sought to be reviewed was entered on May 14, 1999, Mass. App. 1, and rehearing was granted in part and denied in part on October 29, 1999. Mass. App. 64.

The date of any order respecting rehearing. Rehearing was granted in part and denied in part on October 29, 1999. Rehearing en banc was denied that same date, with five of the nine participating judges voting for rehearing.

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[1] Citations to "Mass. App." refer to the appendix filed by the Commonwealth of Massachusetts and the State of New Jersey with their petition for certiorari.

Express reliance on Rule 12.5. This cross-petition for a writ of certiorari is filed under Supreme Court Rule 12.5. The petitions for certiorari in connection with which this cross-petition is filed were docketed on January 28, 2000 (*Browner v. American Trucking Ass'ns*, no. 99-1257; *Commonwealth of Massachusetts v. American Trucking Ass'ns*, no. 99-1263; and *American Lung Ass'n v. American Trucking Ass'ns*, no. 99-1265).

The statutory provision conferring certiorari jurisdiction on this Court. 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

Constitution: U.S. Constitution, Article 1, § 1.

Statutes: Clean Air Act §§ 108, 109, 169A, 302, 307; 42 U.S.C. §§ 7408, 7409, 7491, 7602, 7607.

Regulation: 40 C.F.R. § 50.7.

The full text of these provisions are contained in the appendix to the petition of the Commonwealth of Massachusetts and the State of New Jersey (Mass. App.), and are not repeated here, except for CAA §§ 169A and 302(h), which are set forth *infra*, App. 1-3.

STATEMENT OF THE CASE

Petitioners Citizens for Balanced Transportation, Richard Romero (on behalf of himself and his minor son, Richard Romero, Jr.), David Matusow, Brian McCarthy,

James Bassage and Michael Gregory ("CBT") petitioned below for remand to the United States Environmental Protection Agency ("EPA") of the 24-hour primary and secondary national ambient air quality standards (NAAQS) for fine particles (FP), i.e., particles less than 2.5 micrometers in diameter (PM 2.5). CBT challenged the primary standard, required by section 109(b)(1) of the Clean Air Act ("CAA" or "Act") to protect public health with an adequate margin of safety, because it is set so high that it fails to prevent, even in the Nation's most polluted cities, the daily concentrations of fine PM that EPA found to be associated with the incidence of thousands of premature deaths and tens of thousands of cases of serious disease each year. CBT challenged the identical secondary standard, required by CAA § 109(b)(2) to protect public welfare from "any known or anticipated adverse effects," because EPA admitted that the level of the standard would continue to allow adverse effects on at least one aspect of the public welfare enumerated by the Act – visibility.

The court of appeals' decision is completely silent regarding petitioners' claim that the primary NAAQS fails to protect public health from at least half of the many thousands of premature deaths and other serious adverse health effects that EPA attributed to PM2.5 exposures. Silence appears to be the only option by which the panel could reject CBT's claim without reversing 20 years of judicial precedent requiring that NAAQS be adequate to prevent pollution-related mortality and other adverse health effects.

The court rejected CBT's challenge to the secondary standard by squarely contradicting the statutory directive that "any [ ] secondary [ ] standard . . . shall specify a level of air quality [that] is requisite to protect public welfare from any known or anticipated adverse effects . . . ," concluding instead "that the Congress did not intend the secondary NAAQS to eliminate all adverse visibility effects . . . ." Mass. App. 52.

The court remanded all the PM standards to EPA on the ground that Congress failed to supply an intelligible principle to govern standard-setting under section 109 of the Act. The EPA, American Lung Association, Commonwealth of Massachusetts and the State of New Jersey have petitioned for certiorari to reverse the court of appeals' inappropriate application of the nondelegation doctrine in these cases. CBT agrees with those petitions, but files this cross-petition asking for a writ to correct the court of appeals' failure to apply the appropriate standard for review under CAA § 307(d) that would have required the Court to remand EPA's 24-hour PM2.5 NAAQS as arbitrary and capricious and not consistent with law.

I. Adverse Health Effects Of Fine Particles Are Not Prevented.

The importance of EPA's failure to set a 24-hour PM 2.5 NAAQS adequate to prevent the adverse health effects EPA attributed to daily concentrations of FP found in most U.S. cities is best demonstrated by the high PM-related death toll the Administrator estimated would continue after the new NAAQS are met. In two cities (Philadelphia and Los Angeles), EPA performed a

comprehensive Risk Assessment ("RA"),[2] including an assessment of residual PM-related mortality and other adverse health effects that would be expected to remain after meeting both new PM2.5 standards (annual and 24-hour).[3] The RA demonstrated that compliance with the 65 μg/m3 24-hour standard would continue to allow a central estimate of 1,200 and 970 PM-related excess deaths in Los Angeles and Philadelphia, respectively.[4] In marked contrast, the RA showed a daily standard set at 25 μg/m3 would reduce the estimated incidence of PM2.5-related mortality in Los Angeles to approximately 120 deaths/year and in Philadelphia to about 110 deaths/year. JA(PM) 2100, 2102.[5]

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[2] *A Particulate Matter Risk Assessment for Philadelphia and Los Angeles*, (Abt Associates, Inc. prepared for U.S. EPA, Office of Air Quality Planning and Standards, July 1996, revised November 1996), pp. 113-116; JA(PM) 3370-3373 [see footnote 5].

[3] 40 C.F.R. § 50.7(a)(1), Mass. App. 111.

[4] The RA results are also summarized in *Review of the National Ambient Air Quality Standards for Particulate Matter: Policy Assessment of Scientific and Technical Information* – OAQPS Staff Paper (Office of Air Quality Planning and Standards, US EPA, July 1996) ("Staff Paper"), Tables VI-12b and VI-13b; JA(PM) 2100, 2102. EPA discusses the residual mortality expected to remain after implementation of the proposed NAAQS at 61 Fed. Reg. 65,651; JA(PM) 132, but only reports the deaths attributed to short-term exposures. The estimates quoted here are for total mortality associated with both short-term and long-term exposures because, according to EPA's Risk Assessment as reported in the Staff Paper; JA(PM) 2105, mortality from both types of exposure would be prevented by the emission reductions necessary to meet 24-hour standards.

[5] In accordance with Supreme Court Rule 12.7, this cross-petition cites to the joint appendix relating to particulate matter compiled in the court of appeals as "JA(PM)."

EPA Staff's review of the RA concluded that the 65 μg/m3 24-hour standard provides no incremental protection beyond the annual standard in either Philadelphia or Los Angeles. In Philadelphia, EPA Staff found that the 15μg/m3 annual standard "is estimated to result in reductions in . . . health risks (about 14-20% reduction for effects associated with short-term exposures and about 28% reduction for mortality associated with long-term exposure)." JA(PM) 2105. By comparison, "attaining a 25 μg/m3 24-hr standard in Philadelphia County is estimated to result in the largest risk reductions (e.g., about 69-73% reduction in mortality and other health effects associated with short-term exposures and 100% reduction in mortality associated with long-term exposures to PM)." *Id.* Thus a 25 μg/m3 24-hour standard would reduce estimated total PM2.5-related premature deaths in Philadelphia by 91% (from 1,290 (±490) to 110 (±40)). The corresponding health benefit from a 25 μg/m3 standard in Los Angeles would be a reduction in PM2.5-related mortality of about 95% (from 2,820 (±1,040) to 120 (+100/-20)) compared to about a 50% reduction in mortality from the standard EPA adopted. JA(PM) 2102, 2105-06.

Extrapolating these results to cities across the Nation, EPA's choice of standards means that many thousands will die prematurely and many tens of thousands will suffer other serious health effects each year from the effects of FP exposures that would be prevented if the Administrator had promulgated a 24-hour standard at 25 μg/m3.

A. EPA Is Silent About True Public Health Impact.

The Administrator provided no candid discussion of the results of her RA in the final rule, and offered no

rationale for selecting a standard that continued to allow such a high death toll from exposure to PM2.5. Indeed, the Administrator disingenuously dismissed with a single sentence the evidence from her RA showing nearly nine times fewer PM2.5-related deaths with a 24-hour standard at 25 μg/m3 compared to the level chosen: "Because of . . . the decision to set the [annual] level at the lower end of the annual range, there is no need to consider levels in the lower portion of the 24-hour range below the [50 μg/m3] level proposed." JA(PM) 27. This sole explanation for rejecting the enormous public health benefits of a 25 μg/m3 standard was particularly misleading in view of the RA analysis which unequivocally demonstrated that the nine-fold reduction in PM-related mortality would be achieved by the 25 μg/m3 standard after accounting for the health benefits of the 15 μg/m3 annual standard.

Despite commenters' objections to adoption of the ineffective 65 μg/m3 standard, the Administrator failed to "articulate a satisfactory explanation for [her] action including a 'rational connection between the facts found and the choice made.' " *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins.*, 463 U.S. 29, 43 (1983), citing *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962). The Administrator also offered no explanation for how her decision to set standards that continue to allow half or more of the adverse health effects she attributed to FP exposures satisfies her statutory obligation to protect public health with an adequate margin of safety.

EPA's evidence that PM-related deaths will continue to occur at the FP exposure levels allowed by the new

NAAQS is the same evidence that convinced the Administrator "that the current PM10 standards do not adequately protect public health, and that revision of the standards is not only appropriate, but necessary." 62 Fed. Reg. 38,665; JA(PM) 015. The Administrator's decision to set standards that continue to allow half or more of the deaths and other adverse health effects that she found triggered her duty to revise the 1987 NAAQS does not satisfy the congressional command to protect public health. Her failure to offer any explanation for her choice also violates her obligation to undertake reasoned decisionmaking.

B. Nondelegation Doctrine Is Satisfied By Clean Air Act § 109(b), But EPA's Decision Does Not Satisfy The Statutory Mandate To Protect Public Health.

The nondelegation doctrine bars the delegation by Congress of its power to make law. In the case of the Clean Air Act, Congress has fulfilled its constitutional obligation to provide an intelligible principle to guide and control agency decision-making. CBT agrees with, and adopts here the reasons supporting a grant of certiorari to review the panel decision below for the reasons presented by respondents EPA, American Lung Association, the Commonwealth of Massachusetts and the State of New Jersey. But merely reversing the inappropriate application of the nondelegation doctrine in this case is not enough to ensure the full measure of public health protection Congress intended. The Court should also reverse the court of appeal's failure to apply the proper

standard of review which would require the remand of EPA's 24-hour PM2.5 NAAQS.

Congress has established intelligible principles to govern the setting of NAAQS. Section 109(b)(1) directs the Administrator to set national air quality standards "requisite to protect public health" with an "adequate margin of safety." This statutory directive has been parsed and construed on numerous occasions by the D.C. Circuit which is the only court with direct jurisdiction under section 307(b)(1) to review EPA's NAAQS decisions. The governing principles gleaned from 20 years of NAAQS jurisprudence were recently summarized by the court of appeals in *American Lung Ass'n v. EPA*, 134 F.3d 388, 389 (D.C. Cir 1998) (*ALA*):

> [T]aking account of the "preventive" and "precautionary" nature of the act, *Lead Industries Ass'n, Inc. v. EPA*, 647 F.2d 1130, 1155 (D.C. Cir. 1980), the Administrator must then decide what margin of safety will protect the public health from the pollutant's adverse effects – not just known adverse effects, but those of scientific uncertainty or that "research has not yet uncovered." *Id.* at 1153. Then, and without reference to cost or technological feasibility, the Administrator must promulgate national standards that limit emissions sufficiently to establish that margin of safety. See 42 U.S.C. § 7409(b)(1); *American Petroleum Inst. v. Costle*, 665 F.2d 1176, 1181-82 (D.C. Cir. 1981) (describing NAAQS promulgation procedure); *Lead Industries*, 647 F.2d at 1148-50 (in establishing NAAQS, Congress deliberately subordinated economic and technological feasibility concerns to the achievement of public health goals).

> In its effort to reduce air pollution, Congress defined the public health broadly. NAAQS must protect not only average healthy individuals, but also "sensitive citizens" – children, for example, or people with asthma, emphysema, or other conditions rendering them particularly vulnerable to air pollution. Senate Report at 10; *Lead Industries*, 647 F.2d at 1152. If a pollutant adversely affects the health of these sensitive individuals, EPA must strengthen the entire national standard. *Lead Industries*, 647 F.2d at 1153 (NAAQS "must be set at a level at which there is 'an absence of adverse effect' on [ ] sensitive individuals") (quoting Senate Report at 10).

This long history of decisions require that NAAQS at least protect against "known adverse effects," *ALA*, supra, as the minimum level of protection consistent with § 109(b)(1)'s requirement that NAAQS not only protect public health, but do so with an "adequate margin of safety." The margin of safety requirement was added in 1970 to reflect the Nixon Administration's explanation of the National Air Quality Standards Act it proposed to replace the 1967 Air Quality Act: "[A] national air quality standard will be one that protects against the minimum adverse health effect. ***[T]he standards shall be protective of health, which means they must be lesser than the level at which this [adverse effect] was observed. In addition, . . . a margin of safety must be included."[6]

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[6] Testimony before the Senate Subcommittee on Air and Water Pollution of Dr. John T. Middleton, Commissioner, National Air Pollution Control Administration, HEW (May 27, 1970). *Legislative History of the Clean Air Act of 1970*, pp. 1184-85.

The statutory delegation can therefore be seen as carrying a few explicit, but critical guidelines for decision-making. First, EPA is directed to determine "the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health and welfare which may be expected from the presence of such pollutant in the ambient air, in varying quantities." § 108(a)(2). From this compendium of identifiable effects, EPA must exercise judgment to determine which of these are "adverse effects" when experienced by sensitive populations. To carry out this obligation to "protect[ ] the public from harmful effects requires decisions about exactly what these harms are." *Lead Industries*, at 1152. Then the Agency must determine a "level at which there is 'an absence of adverse effect' on [ ] sensitive individuals." Senate Report at 10, *Lead Industries*, at 1153. Finally, the Administrator has discretion to set a margin of safety to account for health effects which are uncertain with regard to either the probability that they will occur, or whether their severity will be "adverse." Thus the Administrator's task is a mixture of mandatory duties to undertake fact finding and to set standards that protect against known adverse effects, and discretionary judgments about what constitutes an adverse effect and the margin of safety required to protect against suspected, but not fully proven effects.

The contours of EPA's delegated authority described by the court of appeals' prior decisions does not "justify a refusal to reduce levels below those associated with London's 'Killer Fog' of 1952," as the majority characterizes EPA's asserted breadth of its discretion. Mass. App. 10. Nor does it justify a standard that fails to prevent half or

more of the premature deaths and other serious adverse health effects that EPA attributes to FP pollution. CBT agrees with the majority below that for EPA to assert such broad discretion is error, but not because Congress failed to give EPA adequate instructions for standard-setting. Rather, by setting NAAQS that fail to prevent known adverse health effects, or known or anticipated adverse welfare effects, EPA is asserting discretion beyond the boundaries of the authority delegated by Congress. Protection for the health of the American people requires that this Court ensure that the court of appeals requires EPA to act within those bounds.

C. EPA's 24-Hour NAAQS Fails To Prevent Known Adverse Effects.

The errors permeating EPA's approach to setting the 24-hour NAAQS are best demonstrated by comparing the rationale offered by EPA for setting the annual FP NAAQS with the virtually unexplained approach taken to set the 24-hour NAAQS. Judge Tatel's dissent points to EPA's analysis for setting the annual FP standard as an example of "a disciplined decisionmaking process constrained by the statute's directive to set standards 'requisite to protect the public health' based on criteria reflecting the 'latest scientific knowledge'." Mass. App. 57, 59-61. But his favorable analysis of the annual NAAQS decision highlights the flaws in setting the 24-hour NAAQS.

1. Annual NAAQS Prevents Effects Demonstrated At 95 Percent Confidence Interval.

In setting the annual NAAQS, EPA analyzed annual exposure data to identify the annual exposures "in individual cities for which **statistically significant** PM-effects associations are reported . . . " and cities where mean concentrations are "nearly **statistically significant**". 62 Fed. Reg. 38,676; JA(PM) 026. EPA defined "statistically significant results" as those "reported at a 95% confidence level." 61 Fed. Reg. 65,642, n. 8; JA(PM) 123. Based on its conclusion that the lowest annual mean it found to be statistically significant was 16 µg/m3, and the lowest nearly statistically significant annual mean was 11 µg/m3, EPA concluded that it would "plac[e] greatest weight on those studies that were clearly statistically significant," and therefore set the annual NAAQS at 15 µg/m3. *Id.* The Agency then confirmed this approach derived from individual city means by comparing the proposed annual standard with the means reported from the multi-city long-term exposure studies. *Id.* Thus EPA relied upon a comparison of the association of effects observed with annual means, and selected the level to prevent effects shown to be statistically significant at the 95% confidence interval. This level of certainty has been recognized as evidence certifiable as "scientific fact." *Ethyl Corp. v. EPA*, 541 F.2d 1, 28 n.58 (D.C. Cir. 1976).[7] At least EPA provided a rational explanation for

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[7] As scientific fact, this level of certainty should be treated as evidence of "known adverse effects" that a NAAQS must prevent, although it begs the question why a nearly statistically significant association at the 92% confidence level should not

concluding that the annual standard protects against the adverse effects associated with annual exposures that are "known" to a degree of certainty treated as scientific fact. Whether the result also provides an adequate margin of safety has not been challenged here.

2. 24-Hour NAAQS Allows Adverse Effects Demonstrated At 95 Percent Confidence Level.

But a similar explanation has not been offered for the 24-hour standard. Most of the evidence of mortality and morbidity associated with FP exposures, as well as the most compelling evidence, is associated with "short-term", i.e., one- to two-day, exposures. Here, EPA found statistically significant evidence that daily exposures to FP concentrations well below 65 μg/m3 are clearly harmful, but failed to set NAAQS adequate to prevent the harm.

EPA found more than 60 "community epidemiological studies that evaluated associations between short-term concentrations of various PM indicators and mortality and morbidity endpoints" and "reported positive, statistically significant endpoints." 61 Fed. Reg. 65,646/1; JA(PM) 127. More than 20 of these studies reported "statistically significant positive associations between fine particle concentrations and mortality and morbidity endpoints." *Id.*, 65,649/1; JA(PM) 130.

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also be prevented either as a known adverse effect or as a highly probable risk justifying the exercise of EPA's discretion to set a margin of safety.

EPA found that the studies described a dose-response relationship between increased daily concentrations of PM2.5 and increased incidence of mortality and morbidity among populations exposed to the higher pollution levels. Referred to as the "relative risk," this correlation was derived from the so-called "core" studies that EPA relied upon to determine that health effects were occurring at levels allowed by the 1987 NAAQS.

In one of these studies, the 1996 critical re-analysis of the Six Cities data, "Is Daily Mortality Associated Specifically with Fine Particles?", Dr. Schwartz notes "that the **day** is the unit of observation in this study." JA(PM) 3060, and "[r]elative risks have been expressed as the percent increase in **daily mortality** . . . associated with each specified increment in particulate air pollution exposure." JA(PM) 3055. Key findings (reported in Table 7) are that **daily FP increases** of only 10 µg/m3 are associated with a 1.5% increase in daily mortality from all causes and a 4% increase in deaths from pneumonia. JA(PM) 3059. All results were reported at the 95% confidence interval. EPA's Staff Paper, at V-63 to V-64, concluded "[t]he estimated increase in daily mortality associated with PM2.5 was consistently positive in all 6 cities (0.8 to 2.2% for a 10 µg/m3 PM2.5 increase) and statistically significant in 3 cities." JA(PM) 2028, 2031.

3. Unregulated Low- To Mid-Concentration Days Represent Most Of The Health Risk.

These adverse health effects associated with 10 µg/m3 increases in daily FP concentrations occur on days with concentrations far below the 65 µg/m3 level set for

the daily standard. Evidence collected by EPA shows that 98% of all daily concentrations in five of the six cities were less than 34 μg/m3 to 46 μg/m3. Koman memo JA(PM) 3508. Indeed, in some of the six cities where daily 10 μg/m3 increases in PM2.5 are significantly associated with increased mortality and disease, even the highest daily reading is below the 65 μg/m3 standard. Day-to-day changes in FP concentrations produce a hundred or more days each year with increases in FP concentrations above the 10 μg/m3 level shown to cause statistically significant increases in adverse health effects. A standard at 65 μg/m3 cannot prevent these health effects.

EPA acknowledged the public health importance of these many days with pollutant levels far below the standard when she concluded "that most of the aggregate risk associated with short-term exposures likely results from the large number of days during which the 24-hour average concentrations are in the low- to mid-range, below peak 24-hour concentrations." 61 Fed. Reg. 65,652/3; JA(PM) 133. In her final rule, she offered no explanation for choosing a 24-hour standard that provides virtually no protection "from the large number of days at lower to mid-range values **above the mean**" that the Administrator found to be responsible for "most of the annual aggregate risk associated with short-term exposures." 62 Fed. Reg. 38,670/3; JA(PM) 020. Again, EPA "failed to offer the rational connection between facts and judgment" that is necessary to "pass muster under the arbitrary and capricious standard." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins.*, 463 U.S. at 56.

4. Unregulated Single-Day Exposures Causes Adverse Effects.

Another major contradiction between facts found and the standard chosen is her decision to select the 98th percentile form of the standard that leaves the seven most polluted days of the year unregulated. The 65 μg/m3 standard only applies to 98% of the daily measurements made each year at a monitor. 40 C.F.R. § 50.7(c). The concentrations measured on the most polluted 2% of the days each year (i.e., 7 daily concentrations in any year when 350 or more days are monitored or the statistical equivalent of 7 days when fewer than 350 days are monitored) are not subject to the standard. For daily monitored contributions in the record, it appears that sites with 98th percentile concentrations at 65 μg/m3 will typically have 7 higher days ranging from 75 μg/m3 to 90 μg/m3.

EPA acknowledged that "higher 24-hour concentrations, including peaks above 70 μg/m3, clearly contribute more mortality per day than low- to mid- range concentrations . . . ." 61 Fed. Reg. 65,652/3; JA(PM) 133. EPA emphasized the importance of these individual 24-hour exposures for the standard-setting decision by concluding that adverse health effects

> including premature mortality and increased hospital admissions, have generally been reported with same-day, previous day, or longer lagged single-day concentrations, although some studies have reported stronger associations with multiple-day average concentrations. [T]he Administrator recognizes that a 24-hour PM2.5 standard can effectively protect against

> episodes lasting several days, since attainment of such a standard would provide protection on each day of a multi-day episode, while also protecting sensitive individuals who may experience effects after even a single day of exposure.

62 Fed. Reg. 38,668; JA(PM) 018. The Administrator's finding that the adverse health effects EPA attributes to PM2.5 occur after single-day exposures makes clear that the NAAQS must prevent such daily exposures in order to prevent the adverse health effects of PM2.5.

EPA acknowledged that the need for protection from single-day exposure events is especially great in areas where the "annual standard cannot be expected to offer an adequate margin of safety against the effects of all potential short-term exposures in areas with strong local or regional sources;" 62 Fed. Reg. 38,676/3; JA(PM) 026; and "situations where the daily peaks and annual averages are not consistently correlated." *Id.*, 38,669; JA(PM) 019. Examples include western cities where the rural air supply is very clean, and where the clean days in large cities are therefore much cleaner than in the East, but where during stagnation periods the dirty days can be just as polluted as high-pollution days in eastern cities. Thus evidence in the record suggests most western cities (except Los Angeles) expect to receive no protection from the annual standard against the health effects caused on high pollution days because annual concentrations (which average clean and dirty days together) will meet the annual NAAQS. PM2.5 data from western cities in the record indicate EPA's 65 μg/m3 daily standard will require no reductions in daily FP levels in any western

city. Yet many days per year pollutant concentrations are 10, 20 or even 40 μg/m3 above background levels, and therefore more than high enough to reach levels that EPA found to be associated with excess deaths and other adverse health effects. Even Los Angeles is not expected to exceed the 24-hour standard on the most polluted days after attaining the 15 μg/m3 annual NAAQS, although data from EPA's Risk Assessment for Los Angeles indicate that 21% of the days each year are expected to continue reaching the low-formed-range levels above the mean that EPA found account for most of the aggregate risk of increased mortality and morbidity.

There is no rational connection between a standard that theoretically allows 7 daily concentrations as high as 250 μg/m3 each year with the Administrator's conclusions that adverse health effects, including premature death, occur after single day exposures, and that peak daily exposures above 70 μg/m3 represent the greatest daily risk.

D. EPA Articulates No Rational Basis For The 24-Hour Standard.

In the face of EPA's Staff Paper conclusion that even 10 μg/m3 increases in daily FP concentrations are large enough to cause statistically significant increases in deaths and other adverse health effects,

- the Administrator's finding that protection from daily concentrations is needed because single day events cause premature death and serious disease for sensitive individuals,

- the Administrator's conclusion that most of the aggregate risk is caused by low- to mid-range daily concentrations above the annual means, and

- the mathematical reality that the annual standard cannot effectively prevent daily peaks above levels associated with adverse effects,

the Administrator has provided no rational basis for the final 24-hour standard. Choosing to back away from both the 50 μg/m3 NAAQS she proposed and the 25 μg/m3 alternative she expressly considered, the Administrator offered no explanation of the relationship between the standard chosen and the evidence in the epidemiological studies that virtually all observed mortality and morbidity effects associated with **increased daily** exposures occur at concentrations below the 65 μg/m3 level of the 24-hour standard. Thus her standard provides no protection against the mortality and other effects of **daily** exposures she found based on the epidemiological studies.

Instead of offering any rational analysis of the public health consequences of her choice, the Administrator baldly asserted

> that any standard within this range [50 to 65] would provide some margin of safety . . . [T]he Administrator has concluded that a 24-hour standard at the level of 65 μg/m3 would provide an effective limit in the role as a supplement to the annual standard.***Accordingly, after weighing these factors in light of the scientific uncertainties, the Administrator believes that a 98th percentile 24-hour PM2.5 standard of 65 μg/m3 would provide an adequate margin of

> safety against infrequent or isolated peak concentrations that could occur in areas that attain the annual standard of 15 μg/m3.

Id. Unlike the rationale she offered as the basis for selecting the annual standard that at least explained why she believed the annual exposures allowed by the standard were below the levels shown to be statistically significantly associated with adverse health effects, her discussion of the 24-hour standard was completely devoid of any analysis of the statistical evidence showing adverse health effects from **daily** exposures at 20, 30 and 40 μg/m3 – far below 65 μg/m3. She did not even attempt to reconcile her decision with her conclusion summarizing the effects data "that most of the aggregate risk associated with short-term exposures likely results from the large number of days during which the 24-hour average concentrations are in the low- to mid-range, below peak 24-hour concentrations." 61 Fed. Reg. 65,652; JA(PM) 133.

The Administrator provided no explanation for how her 24-hour standard could possibly satisfy her minimum statutory obligation to ensure that NAAQS protect against FP exposures "known" to be associated with adverse health effects. The rationale she relied upon to justify the annual standard would require the 24-hour standard to be set below the level where there is demonstrated a statistically significant association with increased mortality and morbidity. In marked contrast to the annual FP standard, she made no claim that known adverse effects associated with daily exposures would be prevented.

II. EPA Established Secondary PM2.5 NAAQS At Levels That Fail To Protect Against Adverse Visibility Effects.

Secondary standards must be adequate "to protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air." CAA § 109(b)(2), 42 U.S.C. § 7409(b)(2). The Clean Air Act defines effects on welfare to include effects on "visibility." CAA § 302(h), 42 U.S.C. § 7602(h). Congress believed that secondary standards were "especially important because some pollutants could have serious effects on the environment at levels below those where health effects occur." JA(PM) 4264.

EPA acknowledges that visibility impairment is an "important," "significant," and "adverse" public welfare impact of PM pollution. 62 Fed. Reg. at 38,680; JA(PM) 30; Responses to Significant Comments on the 1996 Proposed Rule on the NAAQS for Particulate Matter (July 1997) ("RTC") 92, 94; JA(PM) 306, 308. According to EPA, the scientific evidence of these impacts is "unequivocal." RTC 92; JA(PM) 306. PM emissions from human activity are a "significant" cause of impaired visibility in most parts of the country. Staff Paper; JA(PM) 2177. Visibility impairment due to PM pollution occurs virtually all the time at most national park and wilderness monitoring stations. National Research Council, Protecting Visibility in National Parks (1993) 1; JA(PM) 4277. Average visual range in most of the western United States is approximately one-half to two-thirds of what it would be without this pollution. *Id.* In the east, visual range is about one-fifth of what it would be under natural conditions. *Id.*

In the rulemaking at issue here, EPA set the secondary PM2.5 NAAQS at levels identical to the primary NAAQS. The Agency conceded that the primary NAAQS are not intended to address visibility impairment and would not be adequate to address visibility throughout the nation. EPA stated that although the adopted NAAQS would result in improved visibility in a number of eastern cities, they would produce "little or no change in the western United States except in and near certain urban areas." 62 Fed. Reg. at 38,681; JA(PM) 41. The Agency further conceded that "quantitative information demonstrat[es] how fine particle levels at and below the level of the PM2.5 primary standards result in known or anticipated adverse effects on visibility," and that these effects are "adverse." RTC 94; JA(PM) 308.

EPA attempted to justify its failure to set adequate secondary NAAQS by stating that visibility impairment allowed by the new standards was more appropriately addressed by other programs. The Agency specifically cited a special program that it is developing under CAA § 169A to address visibility problems in certain national parks and wilderness areas. 62 Fed. Reg. at 38,681; JA(PM) 31. The U.S. Department of Interior (DOI) and other commenters pointed out that this "Regional Haze" program would only apply to about 13 percent of all national parks, and would not apply at all to cities and other areas suffering visibility impairment. DOI Letter; JA(PM) 4263. EPA responded that some of these areas might benefit from the new NAAQS, and others should

rely on local programs to address their visibility problems. 62 Fed. Reg. at 38,681-83; JA(PM) 31-33.[8]

In the court below, CBT challenged EPA's decision to set secondary NAAQS at the levels of the primary health standards rather than at levels that protect public welfare from adverse visibility effects, despite the Agency's admission that the primary NAAQS would not prevent these effects. Although the court declined to reach the thrust of CBT's challenge to the secondary standard in light of its remand of the primary NAAQS, the court did address the question of statutory interpretation raised by CBT, i.e., whether the Clean Air Act requires EPA to remedy all adverse visibility effects through promulgation of the secondary NAAQS, or whether some of those effects may be remedied through other means. The court of appeals incorrectly agreed with EPA that the agency had discretion to rely upon the regional haze program to mitigate visibility impairment caused by PM2.5. Mass. App. 52.

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[8] EPA also cited regional differences in background PM levels, average relative humidity, and other variables that affect visibility as justification for its failure to address visibility. 62 Fed. Reg. at 38,680-81; JA(PM) 30-31. The court of appeals did not rely on these arguments to uphold EPA's interpretation of the Clean Air Act.

REASONS FOR GRANTING THE WRIT

I. THOUSANDS OF LIVES AND THE HEALTH OF MANY TENS OF THOUSANDS MORE ARE AT STAKE.

This is a case where the American people, especially millions of children, the elderly and those with existing cardiopulmonary disease, are at significant risk of suffering increased incidence of severe disease symptoms or premature death. EPA has not performed its assigned premature statutory responsibility to protect the public from the largest portion of this risk, and the court of appeals has completely abdicated its responsibility to protect the public by requiring faithful implementation of the law.

No other court beside this Court will have an opportunity to correct this wrong to the American people. The practicalities are such that citizens cannot themselves sue for relief from ubiquitous contamination of the public air supply caused by dispersed pollution emanating from nearly 200 million motor vehicles and tens of thousands of stationary sources. The Clean Air Act provides their only remedy. But the remedial mechanisms of the Act will never be triggered if the air quality standards are not set at levels adequate to protect public health.

II. THE AGENCY ERROR HERE IS GLARING AND UNCONSCIONABLE.

EPA's 24-hour PM2.5 NAAQS decision offers a textbook example of an agency decision so riddled with unexplained contradictions, so lacking in a rational connection between the facts found and the choice made, and so significant with regard to its national impact on public

health that it fails to satisfy the most basic test of reasoned decisionmaking – the obligation to "articulate a satisfactory explanation for its action. . . . " *Motor Vehicle Mfrs. Ass'n, supra.* The failure of the court of appeals to demand such a satisfactory explanation, thereby depriving the public of protection from a well-proven public health threat, is the central error in the decision below. This cross-petition seeks a writ addressed to the proper standard for review that the court of appeals should have applied because the real errors in EPA's primary NAAQS decision were not addressed below.

Recently, the court of appeals properly demanded a reasoned explanation in another NAAQS decision, and remanded to EPA.

> Where, as here, Congress has delegated to an administrative agency the critical task of assessing the public health and the power to make decisions of national import in which individuals' lives hang in the balance, that agency has the heaviest of obligations to explain and expose every step of its reasoning. For these compelling reasons, we have always required the Administrator to "cogently explain why [she] has exercised [her] discretion in a given manner." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 49 (1983).

ALA v. EPA, 134 F.3d at 392. For this reason, to wit, the court's failure to demand reasoned decision-making, not the lack of an intelligible statutory principle, the writ should be granted and the decision below vacated and remanded.

EPA's 24-hour primary PM2.5 standard must also be remanded in order to ensure that the American people

receive the full measure of public health protection required by Congress. The remand should direct EPA to remedy its failure to set a primary standard that protects the public from FP pollution levels that EPA found to be associated with premature death and other serious adverse effects. Unless the standard prevents such adverse health effects, it does not satisfy the directive of § 109(b)(1) to protect public health with an adequate margin of safety.

III. THE COURT OF APPEALS' RULING CONCERNING THE SECONDARY PM2.5 NAAQS PRESENTS AN IMPORTANT QUESTION THAT WAS ERRONEOUSLY DECIDED BELOW AND SHOULD BE REVIEWED BY THIS COURT.

The court of appeals clearly erred in holding that EPA may rely on the regional haze program as a surrogate for performing its statutory duty to set secondary NAAQS at levels adequate to protect against adverse visibility effects. First, by allowing EPA to do so, the court violated the basic principle of statutory construction that where Congress has spoken in plain terms, the language must be regarded as conclusive. *Negonsott v. Samuels*, 507 U.S. 99, 104 (1993). The plain language of CAA § 109(b)(2) requires the setting of secondary NAAQS whenever "requisite to protect the public welfare from **any known or anticipated adverse effects** associated with the presence of such air pollutant in the ambient air." 42 U.S.C. 7409(b)(2) (emphasis added). Here, a secondary NAAQS is "requisite" because EPA determined that "adverse effects" on visibility, one of the specifically listed welfare effects requiring protection, are occurring as a result of fine particles in the ambient air.

See CAA § 302(h), 42 U.S.C. § 7602(h). In this context, the word "any" clearly indicates that **all** impacts adverse to public welfare must be addressed by the secondary standard. *See Johnson v. S.E.C.*, 87 F.3d 484, 487 (D.C. Cir. 1996) (courts assume Congress intends words to carry their ordinary, common meaning). The statute provides no exceptions for effects that may be addressed through other programs, and the court of appeals should not have read such an exception into the Act.

Second, the court of appeals failed to consider the narrow scope of the regional haze program, which addresses visibility issues in only 69 Class I national park and wilderness areas in 36 states. DOI Letter; JA(PM) 4263. It is pure speculation for EPA or a court to suppose that the entirety of these states will benefit from the program to the extent of eliminating all adverse visibility effects. Moreover, there is absolutely no evidence in the record to support EPA's assumption that the regional haze program will eliminate adverse effects on visibility in the 14 states exempted entirely from this program. The more likely scenario is that residents of these states will derive no benefit whatsoever from the program, or will experience only a *de minimis* benefit that fails to remedy localized visibility impairment. As a result, residents of exempted states will have nothing to protect them against adverse visibility effects but the secondary NAAQS, a suite of standards that EPA concedes fall far short of the mark. This is directly contrary to the purpose of the 1970 Clean Air Act amendments, which were enacted to require "national" standards to remedy the failure of the states to establish an adequate level of protection nationwide.

Third, the court of appeals disregarded clear differences in purpose between the national secondary air quality standard, which requires minimum protection nationwide, and the regional haze program. The national standard is, as its name implies, designed to set an absolute target value for ambient air quality nationwide. It is only required to eliminate those impacts that are "adverse" to the public welfare. The goal of the regional haze program, on the other hand, is to eliminate **any** visibility impairment from manmade pollution in Class I areas. CAA § 169A(a)(1), 42 U.S.C. § 7491(a)(1). Unlike the secondary NAAQS, the regional haze program does not invite EPA to make a judgment about whether visibility impairment is "adverse," but the program is limited by cost and feasibility considerations. *See* CAA 169A(g), 42 U.S.C. § 7491(g). As a result, the program aims higher than the NAAQS, but it also contains more limitations and provides no assurance that adverse effects will be eliminated.

In sum, the most plausible interpretation of the relationship between these provisions is that Congress did not intend the regional haze program, enacted in 1977 and amended in 1990, to act as a surrogate for the secondary NAAQS, which have been required since 1970. Nor can the regional haze program be effective as a surrogate in many parts of the nation. The program's purpose is limited to providing supplemental benefits beyond the baseline protection afforded by the secondary NAAQS, but only for Class I areas. Thus, EPA is still required to establish secondary NAAQS to address adverse visibility effects across the nation without regard to any benefits that may be provided by the regional haze program. This will not result in duplicative control programs because

the states that are required to implement regional haze strategies may also use those strategies to achieve the secondary NAAQS. Unlike the court of appeals' interpretation, this reading of the Act gives "consistent and harmonious effect" to CAA §§ 109 and 169A, and should be adopted by the Court. *See Alabama Power Co. v. U.S. E.P.A.*, 40 F.3d 450, 455 (D.C. Cir. 1994).

CONCLUSION

The conditional cross-petition for a writ of certiorari should be granted for the foregoing reasons.

DATED: February 28, 2000.

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ADDITIONAL STATUTORY PROVISIONS

42 U.S.C. § 7491. Visability protection for Federal class 1 areas

(a) Impariment of visibility; list of areas; study and report

(1) Congress hereby declares as a national goal the prevention of any future, and the remedying of any existing, impairment of visibility in mandatory class I Federal areas which impairment results from manmade pollution.

(2) Not later than six months after August 7, 1977, the Secretary of the Interior in consultation with other Federal land managers shall review all mandatory class I Federal areas and identify those where visibility is an important value of the area. From time to time the Secretary of the Interior may revise such identifications. Not later than one year after August 7, 1977, the Administrator shall, after consultation with the Secretary of the Interior, promulgate a list of mandatory class I Federal areas in which he determines visibility is an important value.

(3) Not later than eighteen months after August 7, 1977, the Administrator shall complete a study and report to Congress on available methods for implementing the national goal set forth in paragraph (1). Such report shall include recommendations for –

(A) methods for identifying, characterizing, determining, quantifying, and measuring visibility impairment in Federal areas referred to in paragraph (1), and

(B) modeling techniques (or other methods) for determining the extent to which manmade air pollution may reasonably be anticipated to cause or contribute to such impairment, and

(C) methods for preventing and remedying such manmade air pollution and resulting visibility impairment.

Such report shall also identify the classes or categories of sources and the types of air pollutants which, alone or in conjunction with other sources or pollutants, may reasonably be anticipated to cause or contribute significantly to impairment of visibility.

(4) Not later than twenty-four months after August 7, 1977, and after notice and public hearing, the Administrator shall promulgate regulations to assure (A) reasonable progress toward meeting the national goal specified in paragraph (1), and (B) compliance with the requirements of this section.

* * *

(g) Definitions

For the purposes of this section –

(1) in determining reasonable progress there shall be taken into consideration the costs of compliance, the time necessary for compliance, and the energy and nonair quality environmental impacts of compliance, and the remaining useful life of any existing source subject to such requirements;

* * *

42 U.S.C. § 7602. Definitions

* * *

(h) All language referring to effects on welfare includes, but is not limited to, effects on soils, water, crops, vegetation, manmade materials, animals, wildlife, weather, visibility, and climate, damage to and deterioration of property, and hazards to transportation, as well as effects on economic values and on personal comfort and well-being, whether caused by transformation, conversion, or combination with other air pollutants.

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Nos. 99-1257, 99-1263, 99-1265, 99-1426, 99-1431, 99-1442

In The Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.,

Conditional Cross-Petitioners,

v.

CAROL M. BROWNER, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, ET AL.,

Conditional Cross-Respondents.

On Conditional Cross-Petitions For A Writ Of Certiorari To The United States Court of Appeals For The District Of Columbia Circuit

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BRIEF OF STATE RESPONDENTS IN SUPPORT OF ATA AND CAA INDUSTRY'S CONDITIONAL CROSS-PETITIONS

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QUESTION PRESENTED

Whether the Clean Air Act requires that the Environmental Protection Agency must, in setting national air quality standards, ignore all factors "other than health effects relating to pollutants in the air," given that consideration of such factors would permit both the Agency and reviewing courts to avoid confronting constitutional nondelegation issues.

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Appalachian Power Company, et al. and American Trucking Associations, Inc., et al. ("CAA Industry and ATA conditional cross-petitioners" or "conditional cross-petitioners") have submitted Conditional Cross-Petitions in this case, which arises from petitions for writ of certiorari to review *American Trucking Associations, Inc. v. U.S. EPA*, 175 F.3d 1027, *modified*, 195 F.3d 4 (D.C. Cir. 1999). The Conditional Cross-Petitions concern the scope of authority of the United States Environmental Protection Agency ("EPA" or "the Agency") to promulgate or revise a National Ambient Air Quality Standard ("NAAQS" or "standard") under the Clean Air Act ("CAA" or "the Act"). At issue in EPA's petition is whether the Act as construed by EPA creates an excessive delegation of rulemaking authority. The conditional cross-petitioners argue that, if the Court grants review to consider the delegation issue, the Court should also review the related question whether the statute has been properly construed to prevent EPA from considering the costs, as well as the benefits, of regulation.

Respondent States of Michigan and West Virginia oppose question one, and all three Respondent States oppose questions two and three of EPA's petition for certiorari. *See*, Respondent States' Brief in Opposition to Petitions for Certiorari. At the same time, however, Respondent States agree with conditional cross-petitioners' Conditional Cross-Petitions, urging this Court, if it grants certiorari on any of these questions, to also grant certiorari on the issue of whether EPA is authorized to consider factors other than health in setting or revising a standard under Section 109(b) of the Clean Air Act, 42 U.S.C. 7409(b); EPA App. 111a. [1]

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[1] Respondent States of Ohio, Michigan and West Virginia do not support the cross-petition of Citizens for Balanced Transport.

REASONS FOR GRANTING THE CONDITIONAL CROSS-PETITIONS

The Clean Air Act provides that the only mechanism for review of ambient air standards is to petition in the District of Columbia Circuit. CAA §307(b)(1); 42 U.S.C. 7607(b)(1). Review by this Court is, therefore, the only procedure by which to correct a long-standing erroneous decision by the District of Columbia Circuit on EPA's consideration of costs in setting ambient standards under the Clean Air Act. In addition, a correct interpretation of EPA's authority under the Act will avoid altogether the need to reach the nondelegation issue in the first question presented of EPA's petition.

The case below represents the latest in a line of cases from the D.C. Circuit, following *Lead Industries Ass'n. v. U.S. EPA*, 647 F.2d 1130 (D.C. Cir. 1980)("*Lead Industries*"), and holding that the EPA is bereft of discretion to consider the social, economic and environmental costs of, as well as the public health benefits of, a standard under Section 109. *Lead Industries* was wrongly decided, primarily because the language of Section 109 and related sections indicates that EPA has the authority to consider factors other than health when setting an air standard. Under Section 109, "ambient air quality standards" are set, "the attainment and maintenance of which in the judgment of the Administrator, based on such *criteria* and allowing an adequate margin of safety, are requisite to protect the public health." 42 U.S.C. 7409(b)(1); EPA App. 111a (emphasis supplied). The word "criteria" refers to Section 108; Section 108(a) includes a non-exclusive list of factors for setting criteria, and Section 108(b) requires EPA to collect information on cost and technological feasibility simultaneously with establishing a standard. In addition, Congress's direction in Section 109(d)(1) that EPA revise standards "as may be appropriate" in accordance with

Section 109(b) and Section 108, gives EPA discretion to consider factors such as costs. Finally, Section 109(d)(2)(c) requires an "independent scientific review committee" to advise the Administrator of any "adverse public health, welfare, social, economic or energy effects" that may result from revision of a standard. *Lead Industries* and its progeny were, therefore, wrongly decided.

In fact, the *Lead Industries* line of cases, including the case below, seemingly contradicts other cases from the District of Columbia Circuit interpreting other, similar provisions of the Act, as well as other administrative decisions. *See Michigan Department of Environmental Quality v. U.S. EPA*, 2000 U.S. App. LEXIS 3209 (D.C. Cir. 2000) ("*NOx SIP call*"); *Natural Resources Defense Council v. U.S. EPA*, 824 F.2d 1146 (D.C. Cir. 1987) ("*Vinyl Chloride*"). This Court can correct that conflict.

But perhaps most important to the Respondent States, this Court must overrule the D.C. Circuit's erroneous holding because its (and EPA's) interpretation of Section 109 potentially puts the States into an impossible box. Sections 108 and 110 of the Act, under recent D.C. Circuit decisions, *require* the States to consider economic and technological feasibility when implementing a standard for non-threshold pollutants, but the lower court's interpretation of Section 109 in this case *precludes* EPA from doing so. 175 F.3d at 1041; EPA App. 20a-21a. This interpretation creates a potential impasse between EPA and the States in implementing an air standard. The EPA, armed with complete discretion over a non-threshold pollutant and unable to consider economic or technological feasibility, could set a standard that its own data might demonstrate is realistically impossible for the States to achieve when cost and available technology are considered.

In order to resolve this impasse, if the Court grants certiorari in one or more of the petitions submitted in this case, it should also grant certiorari to the Conditional Cross-Petitions of the CAA Industry and ATA conditional cross-petitioners. In addition, the proper interpretation of Section 109 will preclude consideration of the delegation issue.

A. The Court Should Avoid Consideration Of The Non-Delegation Issue By Resolving The Statutory Cost-Benefit Issue.

As this Court has made clear on numerous occasions, it is the "settled policy to avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question." *Gomez v. United States*, 490 U.S. 858, 864 (1989); *Ashwander v. TVA*, 297 U.S. 288, 346-48 (1936)(Brandeis, J., concurring). This case presents just such a situation. As demonstrated below, if the Court grants certiorari on the first question presented in EPA's petition, it should resolve the case by granting and resolving the issue presented in the Conditional Cross-Petitions, and avoiding the constitutional nondelegation issue presented by EPA.

The lower court correctly found that EPA has failed to find an "intelligible principle" for selecting a standard for ozone.[2] 175 F.3d at 1034; EPA App. 5a. It therefore correctly remanded the revised standard to the EPA "to give the agency an opportunity to extract a determinate standard on its own." 175 F.3d at 1038; EPA App. 14a. However, in

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[2] The Respondent States focus here on the ozone standard. However, most of the statements made for ozone apply equally to the standard for coarse and fine particulate matter ($PM_{2.5}$ and PM_{10}). *See, e.g.*, 62 *Fed. Reg.* at 38,688 (July 18, 1997) (PM); 62 *Fed. Reg.* at 38,883 (July 18, 1997) (ozone); Letter from Dr. George T. Wolff, Chair CASAC, to Hon. Carol M. Browner (Nov. 30, 1995), Ozone JA 237, *OAQPS Staff Paper*, PMJA 2068.

so doing, it was constrained by *Lead Industries* to deny EPA the one tool that would most help the Agency in selecting an ozone standard: cost-benefit analysis.

Ozone is a "non-threshold" pollutant; that is, there is no threshold amount, above which deleterious health effects are certain, and below which no or few health effects are known. As the lower court stated, "EPA regards ozone definitely, and PM likely, as non-threshold pollutants, i.e. ones that have some possibility of some adverse health impact (however slight) at any exposure level above zero." 175 F.3d at 1034 (EPA App. 5a), citing Ozone Final Rule, 62 *Fed. Reg.* at 38,863/3 (July 18, 1997). *See also Vinyl Chloride*, 824 F.2d at 1148 (a "non-threshold" pollutant is one which "appears to create a risk to health at all non-zero levels of emission"). *Cf. Lead Industries*, 647 F.2d at 1137-41 (discussing various thresholds for lead exposure used to support the air standard for lead). The court below also noted that "the only concentration for ozone . . . that is utterly risk-free, in the sense of direct health impacts, is zero." 175 F.3d at 1034; EPA App. 6a.

In the absence of a health threshold for a pollutant, it is not surprising that EPA has difficulty articulating an "intelligible principle" based on health alone for its ozone standard, as *any* presence of the pollutant presents some threat to health. As the lower court stated, all the relevant variables related to health with regard to ozone "seem to range continuously from high to low." 175 F.3d at 1039; EPA App. 16a. Despite this acknowledgment, the lower court insists that EPA should be able to develop some health-based principle by which a standard can be developed. 175 F.3d at 1039; EPA App. 16a. And, also despite this acknowledgment, the lower court insists on its interpretation of Section 109(b), first articulated in *Lead Industries*, that EPA is barred from considering any factor other than health. 175 F.3d at 1038; EPA App. 14a-15a.

Ironically, the model suggested by the D.C. Circuit for EPA's use in "building blocks for a principled structure" is the Oregon plan for health care for the poor. This plan involves a ranking of treatments by a measure of the amount of improvement in health *divided by the cost of the treatment.* 175 F.3d at 1039; EPA App. 16a-17a. In other words, the principal model suggested by the lower court for EPA to follow in developing an "intelligible principle" for the ozone standard is itself a cost-benefit analysis.

Another alternative suggested by the lower court is for EPA to "report to Congress, along with such rationales as it has for the levels it chose, and seek legislation ratifying its choice." *Id.*; EPA App. 18a. And indeed, if *Lead Industries* is correct, returning to Congress may be EPA's only legal alternative.

The interpretation of Section 109(b) of the Act suggested by EPA and supported by the lower court logically requires only one of two equally untenable results. The first is that EPA has no discretion and must set the standard for a non-threshold pollutant at zero. The second is that because no factor other than direct health effects can be considered, EPA has complete discretion to select any standard for a non-threshold pollutant. 175 F.3d at 1038; EPA App. 14a.

The first possible result of the lower court's interpretation of Section 109 for a non-threshold pollutant is both untenable and inconsistent with Congress's intent. If health is truly the only factor to be considered, then the only way to prevent any risk of direct adverse health effects is to set the standard at zero. "Thus the only concentration for ozone and PM that is utterly risk-free, in the sense of direct health impacts, is zero." 175 F. 3d at 1034; EPA App. 5a.

Of course, consideration of health as a criterion does not necessarily mean that the concentration chosen should be "utterly risk free." But "for EPA to pick any non-zero level it must explain the degree of imperfection permitted." 175 F.3d at 1034; EPA App. 6a. All of EPA's stated criteria are vague references to "the nature and severity" of health effects, "the size of the sensitive populations at risk," and the "kind and degree of uncertainties that must be addressed." 175 F.3d at 1034-35; EPA App. 6a-7a, citing Ozone Final Rule, 62 *Fed. Reg.* at 38,883/2.

Aside from their vagueness, these factors do not provide a principled method for drawing a line identifying a level of air quality that is "requisite" to protect the "public health." How many deaths or adverse affects in the "sensitive population" is EPA willing to tolerate in the name of "public health"? How severe must a "health effect" be for EPA to consider it in setting a NAAQS designed to protect the "public health"? If direct health risks alone are to be considered, there simply is no principled way to draw a line, below which the effects are acceptable from a "public health" standpoint, and above which they are not. As a consequence, if factors other than direct health effects may not be considered, it is impossible to articulate or discern an intelligible principle for establishing a standard, at any level other than zero, for a non-threshold pollutant.

EPA's NAAQS determinations, as with all agency determinations, are subject to judicial review under the standard articulated in *Chevron U.S.A. v. NRDC*, 467 U.S. 837 (1984). CAA §307(b)(1), (d)(1), (s); 42 U.S.C. 7607(b)(1), (d)(1), (s); EPA App. 120a-21a. Under a non-zero-risk regime with direct health risk as the only criterion, EPA must pull a number out of thin air in setting a standard for ozone. As there is complete discretion in setting a standard under this theory, it is impossible for EPA to commit an abuse of discretion. This renders the standard

essentially unreviewable by the courts. Although the *Chevron* analysis is deferential to administrative agencies, it does not allow the agency complete and unreviewable discretion in its interpretation of acts of Congress.

The dilemma produced by *Lead Industries* and EPA's standardless assertion of authority is what led the D.C. Circuit to invoke the nondelegation doctrine. As the ATA conditional cross-petitioners pointed out, the D.C. Circuit was bound by the *Lead Industries* precedent to preclude EPA's consideration of cost under Section 109, and the only alternative is permitting EPA a boundless (and therefore unconstitutional) discretion. This Court is not bound by *Lead Industries*, and can resolve the case without reaching the nondelegation doctrine, by construing Section 109 to permit consideration of other factors.

B. This Court Should Resolve The Impasse Created For EPA And The States By The District of Columbia Circuit's Holding That EPA Cannot Consider Costs When Setting A NAAQS.

The lower court's decision also places the States in a potentially impossible position. Under the Act, after EPA sets a standard for a particular pollutant, each State is required to develop a state implementation plan ("SIP") for that pollutant. CAA §110; 42 U.S.C. 7410. Indeed, the State is primarily responsible for enforcing a standard. CAA §107; 42 U.S.C. 7407. EPA is required to gather and issue to the States:

> information on air pollution control techniques, which information shall include data relating to the cost of installation and operation, energy requirements, emission reduction benefits, and environmental impact of the emission control technology.

CAA §108(b); 42 U.S.C. 7408(b). In other words, EPA is to gather and provide data to the States on the economic and technological costs of implementing the standard. The lower court has held that this provision of Section 108 does not require or allow EPA to consider costs and benefits in setting a standard. 175 F.3d at 1041; EPA App. 20a.

If this interpretation is correct, then EPA is free to set the standard for a particular pollutant without considering its cost and EPA could set a standard that in practical terms, is impossible to implement because of its costs. The States would be left "holding the bag": required to attain the standard by a specific deadline through their implementation plans, while considering costs of implementation, but faced with an arbitrarily-set and non-cost-effective standard.

This Court's review is necessary to alleviate the potential for the States to be placed in an untenable position under this regime--a regime that forces States to impose controls to abate theoretical health risks without promoting the "public health" of its population.

C. This Court Should Reconcile The Conflicting Holdings By The District Of Columbia Circuit Regarding An Administrative Agency's Authority To Consider Factors Not Mentioned Explicitly In The Enabling Legislation.

Under Section 109(b) of the Act, the EPA is to set air standards "the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health." 42 U.S.C. 7409(b). Once a standard is set, the EPA must review it periodically, and revise it as appropriate under Sections 108 and 109(b).

The D.C. Circuit first considered the scope of EPA's authority with regard to the language of Section 109(b) in *Lead Industries*. In *Lead Industries*, the court reviewed the contention by petitioners in that case that the EPA was *required* by the language of the statute to consider economic and technological feasibility in setting air quality standards for lead. 647 F.2d 1148. However, the court went beyond what was necessary to decide that issue, and held that not only was EPA not *required* to consider economic and technological factors, but that it was *precluded* from doing so. 647 F.2d 1148.

The erroneous dictum has been cited on several occasions since *Lead Industries*, and indeed expanded since *Lead Industries*, to preclude EPA from using a number of factors in determining a standard. For instance, the D.C. Circuit held that in setting the standard for particulate matter, the EPA was precluded from considering the health consequences of unemployment. *National Resources Defense Council v. U.S. EPA*, 902 F.2d 962, 972-73 (D.C. Cir. 1990). In addition, the D.C. Circuit held that EPA could not consider attainability and cost justifications for ozone standards. *American Petroleum Inst. v. Costle*, 665 F.2d 1176, 1184-85 (D.C. Cir. 1981). And in dicta, the D.C. Circuit stated that §109 does "not allow consideration of technological or economic feasibility." *Vinyl Chloride*, 824 F.2d at 1158-59.

The *Lead Industries* rationale was that where Congress did not expressly and specifically provide for consideration of cost or other factors, an agency was forbidden from considering it. 647 F.2d at 1148. To be sure, the courts have correctly held that where statutory language articulates the factors relevant to an agency's decision, the agency may not base its decision on other, irrelevant factors. For example, in *Union Electric Co. v. U.S. EPA*, 427 U.S. 246 (1976), the Court found that a provision enumerating

eight criteria for consideration did not authorize consideration of other criteria. *Id.* at 257. Similarly, in *American Petroleum Institute v. U.S. EPA*, 52 F.3d 1113, 1119 (D.C. Cir. 1995), the lower court struck down EPA's decision to include the goal of ethanol market protection in its promulgation of regulations under Section 211 of the Clean Air Act, 42 U.S.C. 7545, a goal that could "possibly make air quality worse." According to the court, considering this goal as the basis for the regulation did not square with the statutory mandate to adopt performance standards that reduce pollution. And in *Ethyl Corp. v. U.S. EPA*, 51 F.3d 1053 (D.C. Cir. 1995), the D.C. Circuit held that EPA's decision to deny a waiver based on health considerations (rather than the statutorily-required criterion of whether an additive caused or contributed to the failure of an emission control device) was impermissible. *See also NOx SIP call*, 2000 U.S. App. LEXIS 3209, *93 (Sentelle, J., dissenting).

In contrast, broad statutory language directing EPA to adopt rules that protect the "public health" with an "adequate margin of safety," and directing EPA to revise standards as may be "appropriate," does not preclude consideration of any factor. Thus, another line of D.C. Circuit cases holds that an agency can consider costs if not expressly precluded from doing so by statutory language. For instance, in *Vinyl Chloride*, 824 F.2d at 1155, 1163, the D.C. Circuit held that Section 112, 42 U.S.C. 7412, which requires EPA to set an air quality standard for hazardous pollutants with an "ample margin of safety" to protect the public health, did not preclude a consideration of costs. And in *George E. Warren Corp. v. U.S. EPA*, 159 F.3d 616, 622-23 (D.C. Cir. 1998), the D.C. Circuit allowed EPA to consider the effects of a proposed rule on the price and supply of gasoline because there was nothing in the text or structure of the statute to preclude it. In *Grand Canyon Air Tour Coalition v. FAA*, 154 F.3d 455, 475 (D.C. Cir. 1998), the FAA was permitted to consider costs in its plan for

"substantial restoration of the natural quiet," even though costs were not mentioned in the statute. And in *National Resources Defense Council v. U.S. EPA*, 937 F.2d 641, 645 (D.C. Cir. 1991), the D.C. Circuit allowed EPA to use a cost-benefit analysis in determining whether fugitive dust from coal mines should count in identifying "major" contributors to "significant deterioration" under Sections 160 *et seq.*, despite the lack of statutory language mentioning costs. As the D.C. Circuit observed only this month in *NOx SIP call*, 2000 U.S. App. LEXIS 3209 at *36-40, "[t]hese cases are unexceptional in their general view that preclusion of cost consideration requires a rather express congressional direction."[3]

Therefore, in contradiction to the rationale in the *Lead Industries* line of cases, the rationale in *Vinyl Chloride* and similar cases is that where Congress does not enact statutory language that precludes it, and where Congress in fact enacts statutory language (*e.g.*, "ample margin of safety") that opens the door to cost considerations, an administrative agency can consider cost. And where an agency is confronted with cost arguments, and it has discretion to consider them, it cannot lawfully ignore them. Indeed, there is no principled reason why Section 109(b) cannot be analyzed under *Vinyl Chloride* and similar cases, rather than under the erroneous *Lead Industries* test. Several of the cited cases involve similar statutory structures: "a mandate directed to some environmental benefit," "phrased in general quantitative terms," "and contain[ing] not a word alluding to non-health trade-offs." Section 109 fits comfortably into this structure. The language at issue in Section 109 is as follows:

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[3] Respondent States were among those who challenged EPA's *NOx SIP call* rule by asserting, among other claims, that costs were inappropriately considered in the determination of significant contribution.

> National primary ambient air quality standards, prescribed under subsection (a) of this section shall be ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and *allowing an adequate margin of safety*, are requisite to protect the public health.

42 U.S.C. 7409(b)(1)(emphasis added); EPA App. 111a. The examples of mandates "phrased in general quantitative terms" given by the court in *NOx SIP call* include "ample margin of safety," "substantial restoration" and "major." The mandate in Section 109(b), "an adequate margin of safety," is virtually identical to "ample margin of safety" cited by the D.C. Circuit in *NOx SIP call* and analyzed by that court in *Vinyl Chloride*. Like *Vinyl Chloride* and similar cases, Section 109(b) itself does not, on its face, preclude consideration of factors other than health. Therefore, under the rationale of *Vinyl Chloride* and similar cases, Section 109(b) allows EPA to consider cost in setting a standard, because Congress has not expressly forbidden it, while under the rationale of *Lead Industries* and progeny, Section 109(b) precludes EPA from considering cost in setting a standard because Congress does not expressly allow it.

Lead Industries simply cannot be reconciled with the *Vinyl Chloride* line of cases regarding the authority of an administrative agency to consider a factor not expressly mentioned in the statutory language. Given the D.C. Circuit's reluctance to overturn *Lead Industries*, or otherwise reconcile its own jurisprudence, and the potential for avoiding the nondelegation issue, this conflict should be resolved by this Court.

CONCLUSION

For the foregoing reasons, the Court should grant the Conditional Cross-Petitions if it grants certiorari on any form of the first question presented in EPA's petition.

Respectfully submitted,

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In The Supreme Court of the United States

CAROL M. BROWNER, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY,

Petitioners,

v.

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.,

Respondents.

On Petitions For A Writ Of Certiorari To The United States Court of Appeals For The District Of Columbia Circuit

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BRIEF IN RESPONSE FOR STATES OF OHIO, MICHIGAN AND WEST VIRGINIA

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QUESTIONS PRESENTED

1. Whether the court of appeals properly remanded to the U.S. Environmental Protection Agency (EPA or the Agency) revised National Ambient Air Quality Standards (NAAQS) promulgated under Section 109 of the Clean Air Act, 42 U.S.C. 7409, for that Agency to exercise the discretion delegated to it by Congress to develop intelligible criteria for risk management decisions, and whether the court of appeals properly construed the scope of the Agency's discretion in defining those criteria.

2. Whether the lower court had jurisdiction to review a final rule promulgated by EPA under the Clean Air Act, which rule resolved the question of the Agency's authority to replace the congressional "Subpart 2" ozone reduction program in certain areas of the country with a different program of the Agency's own creation.

3. Whether the lower court erred in its unanimous rejection of EPA's final rule regarding the manner in which the Clean Air Act provides for attainment of national ozone standards.

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STATEMENT OF THE CASE

Respondent States of Ohio, Michigan, and West Virginia submit this brief in response to the petitions by the United States Environmental Protection Agency (EPA or the Agency) and other parties for a writ of certiorari to review the decision of the District of Columbia Circuit in *American Trucking Associations, Inc. v. United States Environmental Protection Agency*, 175 F.3d 1027, *modified*, 195 F.3d 4 (D.C. Cir. 1999), EPA App. at 1a. The case before the lower court arose from an EPA rulemaking regarding two pollutants regulated under the Clean Air Act – particulate matter (PM) and ozone. The Respondent States support the Statement of the Case presented in the response briefs filed by the American Trucking Associations, Inc., *et al.* (collectively, ATA) and the Appalachian Power Company, *et al.* (collectively, the CAA Industry Respondents), which discuss both PM and ozone. In this response, the Respondent States focus on just one aspect of the rulemaking – ozone.

Prior to amendment in 1990, the Clean Air Act, 42 U.S.C. 7401, *et seq.* (the Act, cited as CAA), applied an identical statutory program for six specified pollutants, *i.e.*, pollutants for which EPA issued criteria for meeting air quality. Section 109 of the Act, 42 U.S.C. 7409, required EPA to establish a national standard (a National Ambient Air Quality Standard or NAAQS) for each of these pollutants. Once EPA set the national standards, Section 110 of the Act, 42 U.S.C. 7410, required each State to develop a plan (a State Implementation Plan or SIP) to implement its own mix of air pollution control strategies to meet each standard. Each implementation plan had to provide for "attainment" of the national standard within five years, with the possibility of a five-year extension, from the time of the 1977 amendments.

By 1990, Congress recognized that its historic approach to compliance – simply commanding that all States reach attainment of each standard by a date certain – had

failed with regard to ozone. In the face of this failure, Congress established a new approach and a unique program for ozone. In Subpart 2 of Part D of the amended Act, 42 U.S.C. 7511-7511f (CAA Indus. App. at 2a-64a), Congress created an elaborate, 20-year plan for achieving national compliance with the ozone standard, and specified measures that would ensure continued compliance in the future. Integral to that program is the one-hour standard, which Congress codified in Subpart 2.

On July 18, 1997, EPA changed Congress's plan for ozone attainment. On that date, EPA gave final notice of its revision of the national standard for ozone, changing the standard from the one-hour limit of 0.12 ppm set by Congress, to an eight-hour limit of 0.08 ppm.[1] The Respondent States petitioned the District of Columbia Circuit to review that revision. On May 14, 1999, the D.C. Circuit remanded the revised standards for PM and ozone to EPA for further rulemaking. As to Subpart 2 and Congress's plan for regulating ozone, the lower court rejected EPA's conclusion that the Agency had the authority to rewrite the congressional plan. The court relied on Congress's directive that Subpart 2 must apply "by operation of law" to "[e]ach area designated nonattainment for ozone" under the Act. 175 F.3d at 1048; EPA App. at 38a. On this basis, the court held that EPA could enforce a revised ozone standard only "under Subpart 2," 175 F.3d at 1050; EPA App. at 43a, and that the Act precluded EPA "from requiring areas to comply either more quickly or with a more stringent NAAQS." 175 F.3d at 1049; EPA App. at 40a.

EPA's rulemaking and the questions it raises are of substantial importance to the States. However, as described

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[1] The response briefs of ATA and the CAA Industry Respondents describe these limits in detail.

fully below, these questions arise here within the framework of well-established principles of judicial review and rules of statutory construction. The Court need not, therefore, revisit these principles in the context of this case.

POSITION ON GRANTING REVIEW OF QUESTION ONE OF EPA'S PETITION

The States of Michigan and West Virginia adopt the reasoning of the CAA Industry Respondents and ATA for the purpose of denying review of Question One of EPA's petition of certiorari. That question asks whether the lower court properly remanded the revised rules to EPA in order for EPA to exercise the discretion delegated to it by Congress to develop intelligible criteria for risk management decisions, and whether the lower court properly construed the scope of the Agency's discretion in defining those criteria. The State of Ohio does not oppose the Court's grant of certiorari on the "delegation" question.

If, however, the Court grants review of the delegation question, all three Respondent States urge the Court to reformulate that question in a manner consistent with the conditional cross-petitions filed by ATA and the CAA Industry Respondents. In particular, as explained in the Brief of Respondent States in Support of the ATA and CAA Industry Cross-Petitions, the Court may avoid the delegation question altogether if it finds that EPA may consider cost in any revision of a standard under Section 109 of the Act.

REASONS FOR DENYING REVIEW OF QUESTIONS TWO AND THREE OF EPA'S PETITION

Questions Two and Three of EPA's petition ask this Court to review the lower court's decision that EPA may only enforce any revised ozone standard in conformity with Subpart 2 of Part D of the Act. EPA App. at 81a. EPA first

asserts that the lower court did not have jurisdiction to review EPA's decision. EPA Pet. at 19-25. Alternatively, EPA presents to this Court the same arguments EPA made to the lower court on the merits of the question, *i.e.*, the same arguments the lower court rejected in its initial decision and on rehearing. EPA Pet. at 25-29. For the reasons detailed below, neither of these questions warrants additional review by this Court.

A. The Court Should Deny Certiorari on Question Two of EPA's Petition, which Asks for Review of the Lower Court's Jurisdiction to Consider a Final Agency Action.

In its petition for rehearing before the lower court, EPA argued for the first time that the Agency's decision to change the ozone standard was not a final agency action ripe for review. Instead, EPA argues, the court's jurisdiction ended with its review of whether "the statutory provisions at issue precluded EPA from promulgating the revised standard." EPA Pet. at 21. EPA bases this argument on two grounds: first, that the lower court's test for finality is "inconsistent with the test applied by this Court and other courts of appeals;" and, second, that the action is not ripe for review because it "deprived EPA of the opportunity to develop fully its interpretation and to reconcile any tensions that may arise in the future respecting implementation of the revised NAAQS." EPA Pet. at 10.

EPA's arguments ignore the plain language of the Act, which explicitly permitted review in this case, misrepresent the lower court's express findings, which were based on well-established principles of judicial review, and contradict the position EPA took in the final rulemaking that gave rise to this case. It is unnecessary, therefore, for this Court to grant EPA's petition on this question and to revisit established precedent in the context of this case.

1. *The Clean Air Act expressly authorizes review of EPA's action.* Section 307 of the Act provides that "action of the Administrator in promulgating any [NAAQS], . . . or any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this Act may be filed only in the United States Court of Appeals for the District of Columbia." CAA §307(b)(1); 42 U.S.C. 7607(b)(1). That petition for review must be filed within 60 days of the Federal Register notice of the promulgation, and that action may not be judicially challenged thereafter. *Id.*

As EPA points out, Section 307, 42 U.S.C. 7607, also authorizes review of a number of final actions that are locally or regionally appealable in the local circuit court of appeals, including the Agency's approval or promulgation of a state implementation plan under Section 110 of the Act, 42 U.S.C. 7410. That additional authorization, however, in no way limits review, pursuant to Section 307, of EPA's promulgation of rules *at the time of promulgation.* Nor does the case here present a request, express or otherwise, to review "classification challenges." EPA Pet. at 20. Rather, it is a challenge to a final rule governing the manner in which States are to achieve attainment of national ozone standards, and, thus, a challenge specifically provided for under Section 307's scheme for prompt review of rules and standards *upon promulgation.*

Where, as here, the Act expressly provides for the review granted by the lower court, this Court need not grant certiorari to consider this question.

2. *The lower court's decision on finality is consistent with the test applied by this Court and other courts of appeals.* EPA has correctly noted that, in this Court's view, two conditions must be satisfied for agency action to be "final." *Bennett v. Spear*, 520 U.S. 154 (1997). First, "the

action must mark the 'consummation' of the agency's decisionmaking process . . . – it must not be of a merely tentative or interlocutory nature." *Id.* at 177-78, citing *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948). Second, "the action must be one by which 'rights or obligations have been determined' or from which 'legal consequences will flow.'" *Bennett*, 520 U.S. at 178, citing *Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970). Contrary to EPA's suggestion, the lower court applied this well-established test and correctly determined that both elements are satisfied here.

First, EPA's interpretation of Subpart 2 marks the "consummation" of its decisionmaking process. In the preamble to the final rule, EPA stated:

> 4. *Final decision on the primary standard.* After carefully considering the information presented in the Criteria Document and the Staff Paper, the advice and recommendations of [the Clean Air Scientific Advisory Committee], public comments received on the proposal, and for the reasons discussed above, the Administrator is replacing the existing 1-hour, 0.12 ppm primary standard with a new 8-hour, 0.08 ppm primary standard. The new 8-hour standard will become effective September 16, 1997.

62 Fed. Reg. 38,873 (July 18, 1997)(emphasis in original). EPA explained that this "final decision" represented a change from its original intention to delay revocation of the 1-hour standard until after it had approved state plans for implementing the new standard. *Id.* EPA clarified that under this final decision "the provisions of subpart 2 . . . will continue to apply for so long as an area is not attaining the 1-

hour standard. Once an area attains that standard . . . the provisions of subpart 1 . . . would apply to the implementation of the new 8-hour [ozone] standards." *Id.* EPA then codified this decision in Section 50.9(b) of the final rule, from which the petitions below sought review. That section provides, "The 1-hour standard set forth in this section will no longer apply to an area once EPA determines that the area has air quality meeting the 1-hour standard." 40 C.F.R. 50.9(b); Mass. and N.J. App. at 113.

There is nothing tentative about this final decision. As the lower court found, it is "unambiguous and devoid of any suggestion that it might be subject to subsequent revision." 195 F.3d at 8 (EPA App. at 78a), quoting *Her Majesty the Queen ex rel. Ontario v. EPA*, 912 F.2d 1525, 1532 (D.C. Cir. 1990).

Second, as the lower court found, EPA's promulgation of a revised ozone NAAQS triggered a number of "obligations" and "legal consequences." As EPA acknowledged in the preamble to the final rule, the 8-hour standard becomes immediately effective to those areas designated "attainment" under the current standard.[2] Section 107 of the Act requires the Governor of each State, within one year after EPA's promulgation of a revised standard, to submit to EPA a list of designations for all areas in the State. CAA §107(d); 42 U.S.C. 7407(d). Under EPA's theory of the statute, this list of designations then triggers other actions by EPA to promulgate the designations, CAA §107(d)(1)(B); 42 U.S.C. 7407(d)(1)(B), to classify the areas, CAA §172(a)(1); 42 U.S.C. 7502(a)(1), and to apply an attainment date, CAA §172(a)(1); 42 U.S.C. 7502(a)(1), then by the States to implement a plan for meeting the revised

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[2] Reliance on preamble statements to explain final legislative rules is appropriate. *See Fidelity Fed. Sav. and Loan Ass'n v. De La Cuesta*, 458 U.S. 141, 157-58 & n.13 (1982).

requirements, CAA §172(b); 42 U.S.C. 7502(b). EPA's suggestion that finality does not occur until after it designates areas and the States implement plans ignores the burden on the States that flows from EPA's theory of the statute as reflected in the final rule.

The lower court's recognition of the finality of EPA's decision and the immediate obligations that flow from it is consistent not only with this Court's review in *Bennett v. Spear*, but also with the analysis of such questions invariably applied by the lower court and other courts of appeals. *See, e.g., Mobil Exploration & Producing U.S., Inc. v. Dept. of Interior*, 180 F.3d 1192, 1196-1200 (10th Cir. 1999); *Rio Grande Pipeline Co. v. Federal Energy Regulatory Comm'n*, 178 F.3d 533, 540-41 (D.C. Cir. 1999); *Western Ill. Home Health Care, Inc. v. Herman*, 150 F.3d 659, 662-63 (7th Cir. 1998); *Ciba-Geigy Corp. v. USEPA*, 801 F.2d 430, 436-37 (D.C. Cir. 1986).

In short, there is no disagreement between this Court and circuit courts, including the D.C. Circuit, as to the proper inquiries to determine finality, nor even among the parties in this case. EPA's real contention is that the lower court incorrectly applied the law to the facts before it – a contention unworthy of this Court's review.

3. *EPA's action is ripe for review.* In determining that EPA's action was ripe for review, the lower court applied the well-established guidelines of *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967). As this Court has often stated, the question of ripeness turns on "the fitness of the issues for judicial decision" and "the hardship to the parties of withholding court consideration." *Id.* at 149. Here, the lower court determined that the case was fit for review because it presented "a pure question of law, the resolution of which would not benefit from a more concrete setting." 195 F.3d at 9, EPA App. at 79a.

EPA's suggestion to this Court that it should have had more time to further develop its interpretation and to "work through the various implementation provisions" could apply to any rulemaking. *See* EPA Pet. at 25. EPA could always develop its original interpretation and, through various implementation efforts, change its approach. Where, as here, the question is one of law, judicial review need not await further development, even if additional interpretation would prove useful. *Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Dev. Comm'n*, 461 U.S. 190, 201-02 (1983).

Nor must judicial review await a more concrete injury to potential petitioners. Where, as here, "decisions to be made now or in the short future may be affected" by a court's decision, review is proper. *Rail Reorganization Act Cases*, 419 U.S. 102, 144 (1974).

As with its decision on finality, the lower court applied well-established principles of jurisprudence to determine that the issues before it were fit for review and that delay would cause further hardship to the parties. It is unnecessary, therefore, for this Court to revisit these established principles in the context of this case.

B. The Court Should Deny Certiorari on Question Three of EPA's Petition, which Seeks Re-argument of the Case Below.

As an alternative to its argument that the lower court lacked jurisdiction to review the Agency's action, EPA asserts that the lower court did not decide the merits of the case correctly. As with its decisions on finality and ripeness, however, the lower court decided the merits of the Subpart 2 implementation question within the framework of well-established principles of statutory construction. The lower

court determined that EPA's decision was contrary to Congress's intent, as expressed in the plain language of the 1990 amendments to the Clean Air Act. Re-argument of this question is, therefore, unworthy of review by this Court.

1. *The interlocutory nature of the lower court's decision counsels against granting certiorari on Question Three presented by EPA.* In their briefs in response to the petitions for certiorari, ATA and the CAA Industry Respondents have fully explained the interlocutory nature of the lower court's decision, which requires additional rulemaking. *See* CAA Industry Respondents Brief in Response at 29-30; ATA Brief in Response at 16-18. The Respondent States support the arguments presented in those briefs.

2. *The lower court correctly decided that EPA may only implement any revised ozone NAAQS in conformity with Subpart 2 of Part D of the Act.* In the case below, the Respondent States argued that Subpart 2 codified the one-hour, 0.12 ppm ozone standard and, therefore, only Congress can promulgate a revised standard for ozone. The Respondent States based their argument on the explicit language of Section 181(a), 42 U.S.C. 7511(a), which applies the Subpart 2 program "by operation of law" to "[e]ach area designated nonattainment for ozone" under Section 107(d) of the Act, 42 U.S.C. 7407(d). The lower court rejected that argument, finding that EPA has authority to revise the ozone standard and to designate areas as nonattainment under Subpart 1 of Part D, which applies to all other nonattainment areas.

The court agreed, however, that EPA does not have authority to implement a more stringent ozone standard in conflict with the Subpart 2 program, which Congress established as the exclusive program for implementing the ozone standard. On rehearing, the court confirmed that "EPA can enforce a revised primary ozone NAAQS only in

conformity with Subpart 2." 195 F.3d at 10, EPA App. at 81a. The court was correct in its analysis that, even if EPA retains the authority to revise the ozone NAAQS and to designate areas not meeting that standard as nonattainment, EPA may only implement that standard using the classifications and attainment dates set by Congress in Subpart 2.

The lower court based its findings, as with its finality and ripeness findings, upon straightforward statutory construction. As *Chevron* instructs, if Congress has spoken on the "precise question at issue," then a court "must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842-43 & n.9 (1984). Congress has clearly spoken here.

Congress enacted Subpart 2 as a comprehensive scheme to address ozone nonattainment. Specifically, as EPA acknowledges, Congress enacted Subpart 2 because the existing controls imposed under Subpart 1, which applies to other nonattainment areas, had failed to bring areas into attainment with the one-hour, 0.12 ppm standard. *See* H.R. Rep. No. 101-490 at 145-50, reprinted in II 1990 Legislative History at 3169-74. Rather than continue to treat all ozone nonattainment areas alike, Congress allowed the various areas between three and 20 years to attain the ozone standard, depending upon the extent of the area's ozone problem. *See id.* at 146-47. Congress provided additional measures that would apply in areas that failed to achieve attainment in 20 years, or that relapsed into nonattainment in the future.

The lower court held that the detailed and comprehensive nature of the Subpart 2 program manifests Congress's intent to require EPA to implement a revised ozone standard only in conformity with Subpart 2. Anything less would conflict with Congress's plan.

First, as noted above, Congress avoided the "one size fits all" approach of Subpart 1 and provided varying deadlines for attainment. In Subpart 2, Congress provided that if an area does not meet the standard on time, the area will "bump up" to the next classification, which includes a new attainment date. If an area does not achieve compliance by the final deadline for the most polluted category, sources within the area are then subject to fees for each ton of pollutant in excess of a baseline amount. In this way, Congress acknowledged that attainment was going to be extremely difficult, if not impossible, to achieve in some areas, and crafted a plan with strong incentives, specific programs, varying deadlines, and remedial measures for areas that failed to meet the applicable deadlines.

Second, Congress mandated specific controls for each category of nonattainment and directed EPA to impose certain requirements for reducing ozone. These specific requirements are a marked departure from the historic approach, which allowed States great latitude in determining what mix of controls is most appropriate to a certain region. Again, these specific requirements were included because Congress saw that the old model could not work for ozone. *See* I Legislative History of the Clean Air Act Amendments of 1990 at 1236 (statement of Rep. Fields)("We have placed what we hope are more realistic deadlines in the new law. We have not, however, simply continued to tell the states to do a plan to clean their air. That did not work. We have imposed some very stringent requirements on nonattainment areas which will in turn have to impose such requirements on industry in those areas").

Third, Congress created several mechanisms by which Subpart 2 was to control ozone attainment for the entire 20-year period and beyond. In conjunction with the bump-up provisions, in Section 182, 42 U.S.C. 7511a, Congress established reasonable further progress

requirements to ensure that States are, in fact, moving towards their goal. Congress also required areas that are "serious," "severe," or "extreme" nonattainment to include "contingency plans" with specific measures that would be implemented if an area does not meet a milestone. CAA §182(c)(9), (d), and (e); 42 U.S.C. 7511a(c)(9), (d), and (e). And Congress expressly mandated that Subpart 2 would continue to apply even if attainment were achieved. CAA §181(b); 42 U.S.C. 7511(b). As a whole, these provisions demonstrate that Congress anticipated that ensuring attainment and maintenance of the ozone NAAQS would be a continuing challenge and, more importantly, that Congress created a statutory structure within Subpart 2 to meet that challenge.

Because Congress has spoken to the "precise question" of ozone attainment under the Clean Air Act, the lower court was correct in its finding that, if EPA has the authority to revise the ozone NAAQS at all, then it may implement that standard only in conformity with Subpart 2. Any further re-argument of these issues within this straightforward statutory framework is unworthy of this Court's review.

3. *The lower court's decision restores certainty for the States.* The States of Massachusetts and New Jersey petition for certiorari on the merits of the Subpart 2 question, in part because the situation resulting from the lower court's decision "creates enormous uncertainty for the states as regulators." Mass. and N.J. Pet. at 29. On the contrary, the lower court's decision *restores* the certainty that existed prior to EPA's attempted interference with the program for ozone attainment that has been in place since 1990 — Congress's program under Subpart 2.

In fact, EPA's action would have created regulatory confusion in and among States because it created two

national standards instead of one. Many States, including both Michigan and Ohio, would have had different standards applicable in different parts of the State, as some portions of each would still be subject to the one-hour standard and some would not. *See* 62 Fed. Reg. 60,318, 60,323 (July 18, 1997); 63 Fed. Reg. 2,726, 2,762, 2,778 (January 16, 1998). The same would hold true among and between States, thus making the quantification of interstate pollution, the Petitioner States' primary concern, more difficult.

But, most fundamentally, implementation of a national ozone standard in a manner not in conformity with Subpart 2 would force the States to return to the failed compliance scheme that Congress abandoned when it created Subpart 2. Such a resurrection of the historic dilemma the States had in creating a plan to comply with an unachievable standard by a specific timeframe would not only create uncertainty, but would undoubtedly prove to be unsuccessful once again.

CONCLUSION

For these reasons, the Court should deny certiorari on Questions Two and Three presented by EPA. If the Court grants certiorari on Question One of EPA's petition, the "delegation" issue, then the Court should reformulate that question in a manner consistent with the conditional cross-petitions filed by ATA and the CAA Industry Respondents.

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No. 99-1442

IN THE
Supreme Court of the United States
OCTOBER TERM, 1999

CITIZENS FOR BALANCED TRANSPORTATION, *ET AL.*

Cross-Petitioners,

v.

CAROL M. BROWNER, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, *ET AL.*,

Cross-Respondents.

ON PETITION FOR WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENTS AMERICAN TRUCKING ASSOCIATIONS, INC., CHAMBER OF COMMERCE OF THE UNITED STATES, *ET AL.**

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DISCLOSURE STATEMENT

Respondents are: American Trucking Associations, Inc., Chamber of Commerce of the United States, National Coalition of Petroleum Retailers, Burns Motor Freight, Inc., Garner Trucking, Inc., Genie Trucking Line, Inc., National Automobile Dealers Association, National Association of Manufacturers, National Small Business United, The American Portland Cement Alliance, The Glouster Company, Inc., Non-Ferrous Founders' Society, Equipment Manufacturers Institute, American Farm Bureau Federation, and American Road and Transportation Builders Association.

None of these respondents (collectively "ATA") has any parent corporations, and no publicly traded company owns 10 percent or more of any of these respondents' stock.

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INTRODUCTION

The Court should deny the cross-petition filed by Citizens for Balanced Transportation, *et al.* ("CBT") because it has no bearing on the important statutory interpretation questions presented in the Government's first question and ATA's cross-petition. CBT raises only collateral factual matters – matters that are mere alternative grounds for invalidating EPA's 1997 air-quality rules, would have no immediate impact on EPA's administration of the Clean Air Act ("CAA" or "Act"), are based primarily on misrepresentations of the record, and were not even squarely addressed below. To grant review of CBT's unworthy petition would serve only to further complicate what, if the Court elects to review the decision below, would already be an extraordinarily complex case.

COUNTERSTATEMENT OF THE CASE

ATA provided a full and appropriate statement of the case in its brief in opposition to the Government's petition. By contrast, CBT's so-called "statement of the case" largely defies rebuttal in light of its sheer length (23 pages) and penchant for exaggeration. This counterstatement is accordingly limited to the two most important points CBT raises: the Environmental Protection Agency's ("EPA's" or "the Agency's") rejection of CBT's factual arguments regarding the proper level of the 24-hour primary National Ambient Air Quality Standard ("NAAQS") for fine particulate matter ("$PM_{2.5}$"); and EPA's rejection of CBT's ultimately factual arguments regarding the proper level of the secondary NAAQS for $PM_{2.5}$.

The gist of CBT's argument on the first point is that a Risk Assessment ("RA") prepared by an outside consultant for the Agency "unequivocally demonstrated" that the primary standard selected by EPA is insufficient. *See* CBT Pet. at 7; *see also id.* at 5-6. CBT asserts further that the Administrator "provided no candid discussion of the results of her RA in the final rule," but instead "disingenuously dismissed with a single sentence the evidence from her RA." *Id.* at 6, 7.

In fact, the Administrator discussed at length the various risk assessments in the record, and explained that these "quantitative risk estimates include significant uncertainty and, therefore, *should not be viewed as demonstrated health impacts*." 62 Fed. Reg 38,652, 38,656 (1997) (emphasis added). Indeed, "the inherent scientific uncertainties are too great to support standards based on the lowest concentrations measured in such studies." *Id.* at 38,675. The Agency's Clean Air Scientific Advisory Committee agreed: "[C]urrently the risk assessments are of limited value . . . ." JA(PM) 3163. Based on this record, and its invalidation of EPA's air-quality standards on other grounds, the D.C. Circuit unanimously deemed CBT's arguments unworthy of discussion in its published opinion. No D.C. Circuit judge voted to grant CBT's petition for rehearing on this issue.

With respect to the secondary NAAQS, CBT claims that "EPA admitted that the level of the standard would continue to allow adverse effects on . . . visibility." CBT Pet. at 3. In reality, the Agency concluded that the secondary standard *would* remedy such adverse effects *when considered "in conjunction with" additional regional programs*. *See* 62 Fed. Reg. at 38,679 (emphasis added). EPA explained that reliance on regional programs (in addition to the secondary NAAQS) is appropriate in light of natural differences in visibility across the various regions of the nation. *See id.* at 38,679-82. Indeed, a NAAQS "intended to maintain or improve visibility conditions [in] . . . parts of the West would have to be set at or even below natural background levels in the East . . . ." *Id.* at 38,680.

The court of appeals unanimously determined that it "need not reach the main thrust of the petitioners' challenge to the secondary NAAQS" because it was already remanding that NAAQS based on the statutory interpretation questions presented in the Government's petition and ATA's cross-petition. U.S. App. at 56a. No D.C. Circuit judge voted to rehear this issue either.

On the same day that EPA issued its air-quality rules, the President ordered the Agency to address the "remain[ing] scientific uncertainties" by "promptly initiat[ing] a new review" of the primary and secondary $PM_{2.5}$ standards. 62 Fed. Reg. 38,421, 38,427 (1997). The President stressed that EPA must conclude this review by July 2002, and must not "impos[e] . . . any new controls related to the $PM_{2.5}$ standards" before that time. *Id.* Shortly thereafter, Congress made this pledge binding by enacting legislation delaying implementation of the revised $PM_{2.5}$ NAAQS until $PM_{2.5}$ monitors have been put in place and three years' worth of data have been gathered. *See* Transportation Equity Act for the 21st Century, Pub. L. No. 105-178, § 6102, 112 Stat. 107 (1998). Those events cannot possibly occur anytime before the presidentially mandated review is complete in 2002.

REASONS FOR DENYING THE WRIT

I. ON THEIR FACE, THE FIRST TWO QUESTIONS ARE UNWORTHY OF *CERTIORARI*.

CBT's first two questions do not even pretend to satisfy this Court's criteria for *certiorari*. The first question asserts that EPA did not "'articulate a satisfactory explanation for its action'" in light of the record evidence, while the second asserts that the 24-hour primary standard is contrary to that record evidence. Both those questions involve one-case-only issues that are facially unworthy of review. As this Court has often stated, it "do[es] not grant *certiorari* to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925). Indeed, protecting the Court's scarce resources against dissipation in fact-bound cases is of sufficient importance that the practice of denying *certiorari* in such cases has been codified in the Court's rules: "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10. The Court thus will "'intervene only in what ought to be the rare instance when the

[legal] standard appears to have been misapprehended or grossly misapplied.'" *Mobil Oil Corp. v. FPC*, 417 U.S. 283, 310 (1974) (emphasis added) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 491 (1951)).

This case surely is not the highly exceptional case in which Supreme Court review of factual evidence is warranted. CBT itself appears to sense as much, as it offers a conclusory statement that CBT is also seeking "a writ addressed to the proper standard for review that the court of appeals should have applied." CBT Pet. at 26. But that statement is mystifying. The D.C. Circuit's extensive opinion, far from applying an incorrect standard of review, chose not to address CBT's meritless factual contentions at all.

Moreover, because the court of appeals *remanded* the EPA rules that CBT challenges, CBT's petition presents only alternative grounds for affirmance of the judgment below. Those grounds might theoretically become relevant *if* EPA employs similar reasoning on a similar record on remand. But that entirely hypothetical turn of events could occur several years from now at the very earliest, given that Congress and the President have effectively precluded EPA from implementing *any* revised $PM_{2.5}$ NAAQS before 2002, regardless of what action, if any, this Court might take. *See supra*, at 3. In the meantime, there clearly is no need for this Court to consider CBT's claims. *See, e.g.*, Robert L. Stern, *et al.*, *Supreme Court Practice* § 4.16, at 196 (7th ed. 1993) (interlocutory *certiorari* proper only for "important and clear-cut issue of *law* that is fundamental to the further conduct of the case") (emphasis added; citing cases).

CBT's extravagant assertion that this Court should nonetheless grant *certiorari* because "millions of children, the elderly, and [others] are at significant risk," CBT Pet. at 25, is also spurious. As noted in other filings in this case, the record evidence simply does not support such assertions of a looming health crisis. *See, e.g.*, ATA Brief in Response at 4-7. Even if it did, however, Congress and the President have authoritatively

prohibited EPA from responding. CBT's first two questions therefore present issues that not only are purely factual and record-based, but also are, by law, of little or no real-world importance. Such issues clearly do not warrant this Court's attention.

II. THE THIRD QUESTION IS EQUALLY UNWORTHY OF *CERTIORARI*.

Although CBT packages its third question as a legal issue, that question too is ultimately fact-based and entirely unworthy of review. CBT's third question requests that this Court consider whether "EPA may establish secondary national ambient air quality standards for $PM_{2.5}$ that fail to protect against *all* known or anticipated adverse effects on public welfare, including visibility." CBT Pet. at i (emphasis added).

Even assuming that this question is a properly framed legal issue, it plainly fails the criteria for *certiorari*. *First*, the court of appeals' decision undisputedly does not conflict with decisions of this Court, another court of appeals, or even another panel of the D.C. Circuit. *Second*, this issue was decided unanimously by the D.C. Circuit and attracted no interest by any member of that court on rehearing. *Third*, far from being a matter of exceptional importance, the protections of the *secondary* NAAQS are by definition *not* "requisite to protect the public health" – the primary purpose of the statutory protections of the Clean Air Act. *See* CAA § 109(b)(1, 2), 42 U.S.C. § 7409(b)(1, 2).

The court of appeals largely restricted itself to CBT's technical argument that EPA has "no discretion to decide that some visibility impairment is better remedied through [a] program" other than the secondary NAAQS, while declining to reach "the main thrust of [CBT's] challenge" because it had invalidated the secondary NAAQS on other grounds. U.S. App. at 56a, 57a. CBT's third question therefore seeks *certiorari* so that this Court may consider alternative grounds for affirmance not fully considered below. Likewise, as with

CBT's first two questions presented, the President and the Congress have delayed implementation of the NAAQS at issue – the secondary $PM_{2.5}$ NAAQS – guaranteeing that any decision by this Court will be devoid of real-world impact for years to come.

But in addition to flunking the Court's traditional criteria for *cert*-worthy legal issues, CBT's supposed legal claim simply makes no sense. On one hand, CBT argues that EPA must remedy "*all* adverse visibility effects through promulgation of the secondary NAAQS," rather than "through other means." CBT Pet. at 24 (emphasis added). On the other hand, it contends that Section 169A, a subsequently-enacted provision of the Act, "aims higher than the NAAQS" by requiring EPA to impose *additional* visibility restrictions in certain specific areas. *See id.* at 29 (citing CAA § 169A, 42 U.S.C. § 7491). But if CBT's interpretation of the secondary NAAQS provisions were correct, "all adverse visibility effects" would be required by law to be remedied by the secondary NAAQS, and there would be no "additional" protection for Section 169A or any other law to provide. CBT thus reads section 169A as a statutory nullity – in contravention of the fundamental canon that statutes must be read as a whole so as to give meaning to each of their parts. *See Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985).

Not surprisingly, CBT ultimately retreats to yet another purely factual contention – namely, that EPA's Section 169A program will prove insufficient to remedy adverse visibility effects. *See* CBT Pet. at 28 (claiming "there is absolutely no evidence in the record to support EPA's assumption that the regional haze program will eliminate adverse effects on visibility"). That factual contention, like CBT's other two factual claims, is one that the court of appeals specifically declined to reach. *See* U.S. App. at 56a. And besides being incorrect, *see* 62 Fed. Reg. at 38,681-82, it is no more worthy of *certiorari* than the other two unworthy issues that CBT also presents.

CONCLUSION

There is no reason to complicate this case by granting *certiorari* on collateral, fact-bound, and ultimately meritless issues that generated no controversy below and will have no practical effect for years to come. This Court should deny CBT's cross-petition.

Respectfully submitted,

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In The

Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,

Conditional Cross-Petitioners,

v.

CAROL M. BROWNER, Administrator of the Environmental Protection Agency, *et al.*,

Conditional Cross-Respondents.

On Conditional Cross-Petitions For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

RESPONSE OF AMERICAN LUNG ASSOCIATION TO CONDITIONAL CROSS-PETITIONS FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Environmental Protection Agency must base primary national ambient air quality standards solely on health effects relating to pollutants in the air.

RULE 29.6 DISCLOSURE, AND LIST OF PARTIES BELOW

American Lung Association (ALA) adopts the Rule 29.6 disclosure, and list of parties below, set forth in ALA's petition for certiorari at ii-v.

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CITATIONS TO DECISIONS ENTERED IN THE CASE; BASIS FOR JURISDICTION IN THIS COURT; AND CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED IN THE CASE

American Lung Association (ALA) adopts the citations to decisions entered, the basis for jurisdiction in this Court, and the constitutional provisions, statutes and regulations involved in this case set forth in ALA's petition for certiorari at 1-2.

STATEMENT OF THE CASE

ALA adopts the statement of the case set forth in ALA's petition for certiorari at 2-15. In addition, ALA notes that in the rulemakings at issue, the Environmental Protection Agency (EPA) rejected requests that the agency consider factors other than health effects relating to pollutants in the air. 62 Fed. Reg. 38683-88 (July 18, 1997); 62 Fed. Reg. 38878-83 (July 18, 1997). Specifically, EPA found that in setting primary national ambient air quality standards, the agency was statutorily barred by the Clean Air Act from considering such other factors. *Id.* The court below affirmed this aspect of EPA's decision under step one of *Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), basing its ruling on the plain meaning of the Act and on longstanding D.C. Circuit precedent. App. 17-20.[1] *Accord, id.* at 13.

[1] Citations to "App." refer to the appendix filed by Massachusetts and New Jersey in No. 99-1263. In addition, for purposes of brevity, this response uses the phrase "non-health factors" to encompass all factors other than health effects relating to pollutants in the air.

ARGUMENT

The cross-petitions of American Trucking Associations (ATA) and Appalachian Power Company seek to reopen an issue that has been the subject of consistent interpretation by EPA for three decades and by the D.C. Circuit for two decades, and on which this Court has repeatedly denied certiorari. *See* ATA Cross-Pet. at 5.

Specifically, cross-petitioners seek to reopen the long-standing conclusion of EPA and the D.C. Circuit that Clean Air Act § 109(b)(1) – which mandates national ambient air quality standards (NAAQS) that "protect the public health" with "an adequate margin of safety" – "bar[s] EPA from considering any factor other than health effects relating to pollutants in the air." App. 13 (internal quotations omitted). Cross-petitioners advance the curious assertion that by opening up this straightforward public health mandate to a plethora of other additional factors not specified in the statute, the extent of the congressional delegation can be *reduced*. The additional factors advocated by cross-petitioners are variously described as "overall impacts on society," Appalachian Power Cross-Pet. at 14, "economic or pragmatic factors," ATA Cross-Pet. at 22, "practical impacts," Appalachian Power Cross-Pet. at 15, "economic and social consequences," ATA Cross-Pet. at 23, or "broad economic, environmental, and indirect public health consequences." Appalachian Power Cross-Pet. at i. Moreover, cross-petitioners are apparently uncertain as to whether EPA's consideration of these factors is discretionary or mandatory. Their proposed cross-questions do not ask for a

determination that such consideration is mandatory,[2] and at least one of their cross-petitions advances the view that it is discretionary. Appalachian Power Cross-Pet. at 8 (the D.C. Circuit was "not unreasonable" in holding that EPA is not required to consider cost and feasibility; "a *requirement* to consider costs could allow costs to override public health") (emphasis in original). Elsewhere, however, they assert that EPA "must" consider non-health factors. Appalachian Power Cross-Pet. at 18; ATA Cross-Pet. at 22, 26. *Accord,* Ohio Rsp. to Cross-Pets. at 12.

The ATA and Appalachian Power cross-petitions should be denied. Cross-petitioners' argument that the Court can avoid the constitutional nondelegation question by adopting a statutory interpretation that greatly *increases* the scope of the congressional delegation is patently meritless. Moreover, under this Court's precedent, the constitutionality of the Act and EPA's interpretation can and should be upheld, regardless of how cross-petitioners' questions might be answered. Cross-petitioners do not even defend the D.C. Circuit's conclusion that the Clean Air Act is unconstitutional, and indeed ATA concedes that the Act "undisputedly" is constitutional. ATA Rsp. at 15. Cross-petitioners likewise do not explain how a constitutional statute can be made unconstitutional by an agency interpretation, and this Court's precedent establishes that it cannot.

---

[2] The questions focus on whether EPA "must *ignore*" the non-health factors, ATA and Appalachian Power Cross-Pets., and Ohio Rsp. to Cross-Pets., at i (emphasis added), not on whether EPA must *consider* them.

Thus, far from contributing to this Court's resolution of the nondelegation question, the proposed cross-questions are irrelevant to – and a distraction from – that question. Cross-petitioners are simply seizing upon the lower court's incorrect nondelegation ruling as a means to obtain review of a question that was long ago decided – correctly – by EPA and the D.C. Circuit, and on which the Court has repeatedly denied certiorari.

I. THE QUESTION WHETHER NON-HEALTH FACTORS MAY BE CONSIDERED IN SETTING NATIONAL AMBIENT AIR QUALITY STANDARDS IS SEPARATE FROM, AND UNNECESSARY TO THE RESOLUTION OF, THE NONDELEGATION ISSUE.

A. The Clean Air Act and EPA's Interpretation Pass Muster Under the Nondelegation Doctrine, Regardless of Whether the Act Prohibits, Allows, or Requires Consideration of Non-Health Factors.

In an attempt to obtain review of an issue unworthy of certiorari, cross-petitioners contend that the question whether Clean Air Act § 109(b)(1) permits EPA to consider non-health factors in setting primary NAAQS is "intertwined with" the nondelegation question. ATA Cross-Pet. at 7. *See also* Appalachian Power Cross-Pet. at 4. To the contrary, cross-petitioners' proposed issue addressing non-health factors is not implicated by the lower court's constitutional nondelegation ruling, and review of that statutory issue would in no way assist this Court's review of that ruling. Under this Court's nondelegation jurisprudence, the statutory provisions at

issue in this case, and EPA's interpretation of those provisions, are unquestionably constitutional, regardless of whether the statute requires that EPA consider only direct health impacts of air pollutants (as the lower court correctly held) or whether the agency may – or must – also consider other factors such as cost, socioeconomic factors, and indirect health impacts. Thus, to review the lower court's nondelegation ruling, the Court need not decide whether these other factors may or must be considered by EPA. We turn first to the constitutionality of the Act, and then to the constitutionality of EPA's interpretation of the Act.

Constitutionality of the Act. Cross-petitioners do not defend the lower court's holding that the Clean Air Act violates the nondelegation doctrine. *See* App. 12 (finding that "*statutory language* and an existing agency interpretation involve an unconstitutional delegation of power") (emphasis added); App. 4 ("nor is [an intelligible principle] . . . apparent from the statute"). To the contrary, ATA acknowledges that the Act is "undisputedly" constitutional. ATA Rsp. at 15.

ALA agrees. To pass muster under the nondelegation doctrine, Congress need only specify an "intelligible principle" to guide agency implementation. *Mistretta v. United States*, 488 U.S. 361, 372 (1989). This Congress has plainly done here, with the mandate for NAAQS that "protect the public health" with "an adequate margin of safety," and with ample additional guidance in the Act and legislative history. This Court has "upheld, . . . without deviation, Congress' ability to delegate power under broad standards." *Mistretta*, 488 U.S. at 373. Indeed, contrary to the lower court's insistence on a "determinate criterion,"

App. 5, the Court has upheld statutes specifying thoroughly non-determinate criteria such as "fair and equitable" prices, *Yakus v. United States*, 321 U.S. 414, 426-27 (1944), "excessive profits," *Lichter v. United States*, 334 U.S. 742, 778-86 (1948), "just and reasonable" rates, *Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 600-601 (1944), and even the "public interest," *National Broadcasting Co. v. United States*, 319 U.S. 190, 225-26 (1943). As Justice Scalia put it: "[w]hat legislated standard, one must wonder, can possibly be too vague to survive judicial scrutiny, when we have repeatedly upheld, in various contexts, a 'public interest' standard?" *Mistretta*, 488 U.S. at 416 (Scalia, J., dissenting on other grounds, but agreeing with majority's conclusion that the statute at issue set forth an intelligible principle).

Indeed, this Court's precedent not only confirms ATA's concession that the Clean Air Act is "undisputedly" constitutional, but also establishes that the Act's constitutionality does not in any way depend on whether consideration of costs or other non-health factors is statutorily authorized or mandated. In *American Textile Manufacturers Inst. v. Donovan*, 452 U.S. 490 (1981), concern was expressed by a dissenting Justice that Congress had written the Occupational Safety and Health Act so broadly as to allow three possible interpretations concerning the role of cost-benefit analysis: that Congress "required" the agency to engage in such analysis, that it "prohibited" the agency from doing so, or that it "permitted" the agency to do so. 452 U.S. at 545, 548 n.* (Rehnquist, J.). The majority squarely held that such statutory flexibility would *not* create a delegation problem: "Even [if] . . . there were three possible constructions of the

phrase 'to the extent feasible[,]' . . . *this would hardly have been grounds for invalidating § 6(b)(5) under the delegation doctrine.* After all, this would not be the first time that more than one interpretation of a statute had been argued." *Id.* at 541 n.75 (emphasis added).

As *American Textile* makes clear, this Court can resolve the nondelegation challenge to the Clean Air Act without reaching or deciding whether consideration of costs and other non-health factors is prohibited, allowed, or required.

Constitutionality of EPA's Interpretation of the Act. Moreover, consideration of the role of non-health factors is unnecessary to review of the constitutionality of EPA's interpretation of the Act. First, as stated above, the Court can and should rule – without resolving whether consideration of non-health factors is prohibited, allowed, or required – that the Act passes muster under the nondelegation doctrine. This "undisputed[ ]" constitutionality of the Act (ATA Rsp. at 15) necessarily entails the further conclusion that the lower court erred in requiring EPA to undertake a narrowing construction of the Act. A narrowing construction would only be appropriate if the Act "might otherwise be thought to be unconstitutional." *Mistretta*, 488 U.S. at 373 n.7. No party contends that the Act is or might be thought to be unconstitutional, and any such contention would be patently meritless under the Court's nondelegation precedent. Accordingly, no narrowing construction can possibly be required under the constitutional nondelegation doctrine, and the lower court's insistence on one was error. Because the premise of this conclusion (the undisputed constitutionality of the Act) does not depend in any way

on resolving what role non-health factors have in the setting of NAAQS, the conclusion itself does not require such resolution either.

Second, the core of the lower court's nondelegation ruling was the requirement that EPA specify a "determinate criterion for drawing lines." App. 5. This Court has held, however, that the Constitution does not require an agency to specify *any* rule of thumb to constrain its case-by-case determinations – much less a "determinate" rule of thumb:

> Nor is there any constitutional requirement that the legislative standards be translated by the Commission into formal and detailed rules of thumb prior to their application to a particular case. If that agency wishes to proceed by the more flexible case-by-case method, the Constitution offers no obstacle.

American Power & Light Co. v. SEC, 329 U.S. 90, 106 (1946). Moreover, because the Court's nondelegation precedent has repeatedly upheld non-determinate standards set forth directly in *statutes*, p. 6, *supra*, there is in any event no constitutional basis for requiring agency *interpretations* to be determinate. Accordingly, regardless of whether the Clean Air Act prohibits, allows or mandates consideration of non-health factors, the lower court erred in ruling that the nondelegation doctrine requires EPA to prescribe a "determinate criterion" to govern the agency's decisionmaking.

B. Cross-Petitioners' Proposed Interpretation of the Act Would Broaden, Not Narrow, the Scope of the Congressional Delegation, and Therefore Would Not Avoid the Constitutional Non-delegation Issue.

Cross-petitioners also argue that the Court could avoid deciding the constitutional nondelegation issue by construing the Act to allow consideration of non-health factors. ATA Cross-Pet. at 22; Ohio Rsp. to Cross-Pet. at 2. This argument must be rejected for two reasons.

First, as shown above, the Court's precedent clearly establishes that the Clean Air Act passes constitutional muster under the nondelegation doctrine. There is no merit to cross-petitioners' request that the Court avoid that clear-cut issue – especially when the consequence of such avoidance would be to reach out and decide an issue that has been settled in the agency and the D.C. Circuit for decades, and on which this Court has repeatedly denied certiorari. *See* ATA Cross-Pet. at 5.

Second, cross-petitioners err in asserting that their interpretation would, if adopted, avoid the constitutional issue. Cross-petitioners' argument necessarily rests on the assumption that *expanding* the statutorily cognizable factors beyond health would *narrow* the scope of the congressional delegation. The opposite is true: for reasons stated by then-Justice Rehnquist in *American Textile*, a health-only mandate involves a far narrower delegation than one that allows an agency to balance health against other factors. ALA Pet. at 19-20 (quoting then-Justice Rehnquist).

Indeed, under cross-petitioners' open-ended construction of the Act, *any* conceivable factor would be cognizable by EPA. ATA Cross-Pet. at 23 ("the key text of Section 109(b) rules in consideration of 'public health,' but fails to *rule out* consideration of anything") (emphasis in original); Ohio Rsp. to Cross-Pets. at 11 (§ 109 "does not preclude consideration of *any* factor") (emphasis added). As these assertions make clear, if § 109(b)'s express reference to public health were to be construed as non-exclusive, there is no *statutorily* specified limit to the other factors EPA might be allowed to consider. As demonstrated by cross-petitioners' own multifarious descriptions of their proposed non-health factors, *see supra* at p. 2 (quoting cross-petitioners), reading such factors into the Act would result in a truly broad-ranging delegation. *See Industrial Union Dept., AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 662 (1980) (Rehnquist, J., dissenting, explains why he concluded that the Occupational Safety and Health Act represents an unconstitutionally excessive delegation: "If § 6(b)(5) authorizes the Secretary to reject a more protective standard in the interest of administrative feasibility, I have little doubt that he could reject such standards *for any reason whatsoever*, including even political feasibility.") (emphasis added).

Remarkably, cross-petitioners' proposed interpretation actually would take the Court in a direction diametrically *opposite* to that followed in *Natl. Cable Television v. United States*, 415 U.S. 336 (1974), one of two cases cited in *Mistretta* as having adopted a narrowing interpretation to avoid a nondelegation issue. Construing a statute requiring fees to be "fair and equitable taking

into consideration direct and indirect cost to the Government, value to the recipient, *public policy or interest served, and other pertinent facts," id.* at 337, *Natl. Cable* concluded that the italicized factors should be disregarded. *Id.* at 342-43. As a result, "[t]he phrase 'value to the recipient' is . . . the measure of the authorized fee." *Id.* By contrast, the interpretation proposed by cross-petitioners here would *add* factors to the public health factor enumerated in the statute, thereby *broadening* the scope of the congressional delegation. Cross-petitioners' novel proposal to adopt a "widening" construction of the Act would not avoid the nondelegation issue, and should be rejected.

II. CROSS-PETITIONERS' PROPOSED QUESTION SEEKS TO UPSET THREE DECADES OF AGENCY INTERPRETATION, AS WELL AS TWO DECADES OF D.C. CIRCUIT PRECEDENT ON WHICH THIS COURT HAS REPEATEDLY DENIED CERTIORARI.

Twenty-nine years ago, only four months after enactment of the §§ 109 and 108 provisions governing NAAQS, EPA concluded that the Act "does not permit any factors other than health to be taken into account in setting the primary standards." 36 Fed. Reg. 8186 (April 30, 1971). Since that time, the agency has not wavered from its initial interpretation. *See, e.g.*, 62 Fed. Reg. 38683-88 (July 18, 1997).

Moreover, two decades of jurisprudence by the D.C. Circuit has affirmed that (as stated by the court below) "§ 109(b) . . . bar[s] EPA from considering any factor other than health effects relating to pollutants in the air." App. 13 (internal quotations omitted). *See Lead Industries Ass'n*

v. EPA, 647 F.2d 1130, 1148-51 (D.C. Cir. 1980); *American Petroleum Inst. v. Costle*, 665 F.2d 1176, 1185 (D.C. Cir. 1981); *Natural Resources Defense Council v. Administrator*, 902 F.2d 962, 972-73 (D.C. Cir. 1990); *Natural Resources Defense Council v. USEPA*, 824 F.2d 1146, 1158-59 (D.C. Cir. 1987) (en banc) ("*Vinyl Chloride*"); *American Lung Ass'n v. EPA*, 134 F.3d 388, 389 (D.C. Cir. 1998). Contrary to cross-petitioners' assertions that this caselaw has been superseded by *Chevron*, the D.C. Circuit has confirmed the exclusiveness of health factors in the NAAQS process repeatedly since *Chevron*. *NRDC v. Administrator; Vinyl Chloride; ALA v. EPA*. Moreover, *Lead Industries* itself, though pre-dating *Chevron*, was nonetheless decided "in Chevron step one terms." App. 18.

As cross-petitioners recognize, this Court has repeatedly denied certiorari on these decisions. ATA Cross-Pet. at 5. Moreover, these decisions are consistent with this Court's precedent. In *Union Electric Co. v. EPA*, 427 U.S. 246, 257 n.5 (1976), a decision construing the Clean Air Act, the Court concluded: "Where Congress intended the Administrator to be concerned about economic and technological infeasibility, it expressly so provided." Because Congress did not so provide in § 109(b)(1), EPA properly excluded those factors from consideration.

Likewise, the Court has recently held that the determination whether a product is "safe" within the meaning of the Food, Drug, and Cosmetic Act encompasses only whether "the *product itself* is safe," not whether regulation of the product could produce *indirect* adverse health effects. *FDA v. Brown & Williamson Tobacco Corp.*, U.S. Sup. Ct. No. 98-1152 (March 21, 2000), slip op. at 17

(emphasis in original). The Food and Drug Administration had argued that a cigarette ban would not be "safe" because it would produce indirect adverse effects: "current tobacco users could suffer from extreme withdrawal, the health care system and available pharmaceuticals might not be able to meet the treatment demands of those suffering from withdrawal, and a black market offering cigarettes even more dangerous than those currently sold legally would likely develop." *Id.* at 16. The Court rejected this argument:

> [T]he FDA's conception of safety would allow the agency, with respect to each provision of the FDCA that requires the agency to determine a product's "safety" or "dangerousness," to compare the aggregate health effects of alternative administrative actions. This is a qualitatively different inquiry. . . . Section 352(j) focuses on dangers to the consumer from use of the product, not those stemming from the agency's remedial measures.

Id. at 17-19. This ruling directly supports EPA's and the D.C. Circuit's consistent position that the agency may consider only health effects relating to pollutants in the air – not *indirect* health effects.

Given EPA's and the D.C. Circuit's long-settled interpretation; this Court's prior denial of certiorari; and the consistency of the D.C. Circuit's position with this Court's precedent, there is no reason for the Court at this late date to change course and accept cross-petitioners' proposed issue for review.

III. THE D.C. CIRCUIT CORRECTLY HELD THAT THE ACT EXCLUDES NON-HEALTH FACTORS FROM THE SETTING OF PRIMARY NAAQS.

Another reason for denying certiorari on cross-petitioners' proposed issue is that the lower court was plainly correct in ruling that primary NAAQS must be based only on direct health effects of air pollutants. Section 109(b)(1) specifies that primary NAAQS must be "requisite to protect the *public health*." (Emphasis added.) Moreover, primary NAAQS must be "based on" air quality "criteria," § 109(b)(1), which in turn "shall accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on *public health* or welfare which may be expected *from the presence of such pollutant in the ambient air*, in varying quantities." § 108(a)(2) (emphasis added). Thus, the statute clearly provides that factors other than direct health impacts of air pollutants have no place in the setting of primary national ambient air quality standards.[3]

This conclusion, clear enough on the face of §§ 109(b)(1) and 108(a)(2), is confirmed by other portions of the 1970 Act, which show that Congress knew how to expressly incorporate non-health factors when it wished to do so. For example, § 108(b)(1) provides for EPA to issue "information on air pollution control techniques, which information shall include data relating to the *cost* of installation and operation, energy requirements, emission reduction benefits, and environmental impact of the

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[3] Section 108(a)(2)'s reference to "welfare" is relevant only to the setting of *secondary* national ambient air quality standards, which are to "protect the public welfare." § 109(b)(2).

emission control technology." (Emphasis added.) However, such non-health data is not for the purpose of setting NAAQS, but rather is to be "issue[d] to the States and appropriate air pollution control agencies." § 108(b)(1). Indeed, § 109(b)(1) omits any reference to the § 108(b)(1) control techniques information, instead expressly providing that primary NAAQS are to be "based on . . . [the] *criteria*." (Emphasis added.)

Non-health factors were also referenced in other provisions of the 1970 Act. For example, the 1970 Act retained a preexisting provision mandating "a comprehensive study of the *economic impact* of air quality standards on the Nation's industries, communities, and other contributing sources of pollution, including an analysis of the national requirements for and the *cost* of controlling emissions to attain such standards of air quality as may be established pursuant to this Act." 1970 Act § 312(a), *reprinted in* A Legislative History of the Clean Air Act Amendments of 1977 ("1977 Legislative History") at 7431. Tellingly, § 109(b)(1) omits any reference to such economic and cost analysis as a basis for NAAQS.

In addition, the 1970 Act provided that NAAQS were to be attained within three years from approval of air pollution control plans, § 110(a)(2)(A)(i), 1970 U.S. Code Cong. & Ad. News 1959-60, but allowed for extensions if it could be shown that "the necessary technology or other alternatives are not available or will not be available soon enough to permit compliance within such three-year period." § 110(e)(1)(A), 1970 U.S. Code Cong. & Ad. News 1962. Likewise, other provisions of the Act expressly incorporate non-health factors such as cost and feasibility. § 111(a)(1), 1970 U.S. Code Cong. & Ad. News

1963 (new source performance standards must provide for the degree of emission reduction that is "achievable," "taking into account the cost of achieving such reduction"); § 231(b), 1970 U.S. Code Cong. & Ad. News 1989 (aircraft emission standards shall take effect after such period as is necessary "to permit the development and application of the requisite technology, giving appropriate consideration to the cost of compliance").

"[I]t is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another[.]" *Chicago v. Environmental Defense Fund*, 511 U.S. 328, 338 (1994) (internal quotations omitted). Recognizing this general principle, this Court has specifically held, in a decision construing the Clean Air Act: "Where Congress intended the Administrator to be concerned about economic and technological infeasibility, it expressly so provided." *Union Electric*, 427 U.S. at 257 n.5. Because Congress did not provide for non-health factors to be considered in setting primary NAAQS, EPA is not permitted to consider them.

The absence of non-health factors from the statutory provisions governing primary NAAQS, coupled with their presence in other portions of the Act, is fully sufficient grounds to reject cross-petitioners' proposed interpretation of the Act. But there is additional compelling evidence that Congress's exclusion of non-health factors from the setting of NAAQS was a deliberate choice.

1967 Act. For example, in the predecessor to the 1970 Act (the Air Quality Act of 1967), Congress had provided for issuance of air quality criteria and control techniques

information by EPA's predecessor agency, the Department of Health, Education, and Welfare (HEW). As in the 1970 Act, criteria were defined in terms of direct effects of air pollutants on health, in wording very similar to the comparable wording in § 108(a)(2) of the 1970 Act.[4] As in the 1970 Act, control techniques information encompassed consideration of non-health factors such as cost – indeed, it was even broader, expressly requiring "cost-effectiveness analyses."[5] As in the 1970 Act, ambient air quality standards were to be established. 1967 Act § 108(c), 1967 U.S. Code Cong. & Ad. News 523-24.

Despite the similarities, however, the 1967 Act differed in certain key respects from the 1970 Act. Under the 1967 Act, not only control techniques, but also air quality *criteria*, were to be "issue[d] to the *States*," § 107(b)(1), 1967 U.S. Code Cong. & Ad. News 522 (emphasis added), which were to have the first opportunity to establish ambient air quality standards. § 108(c)(1), 1967 U.S. Code Cong. & Ad. News 523. HEW was to determine whether

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[4] 1967 Act § 107(b)(2), 1967 U.S. Code Cong. & Ad. News 522 (criteria shall "accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on health and welfare which may be expected from the presence of an air pollution agent, or combination of agents in the ambient air, in varying quantities").

[5] 1967 Act § 107(c), 1967 U.S. Code Cong. & Ad. News 522-23 (control techniques information was to include "technical data relating to the technology and costs of emission control," and "such data as are available on the latest available technology and economic feasibility of alternative methods of prevention and control of air contamination including cost-effectiveness analyses").

"such State standards are consistent with the air quality criteria *and recommended control techniques.*" *Id.* (emphasis added). If a state failed to establish standards, or if a Governor so requested, HEW was authorized to issue federal ambient air quality standards, which – like state-issued standards – were to be "consistent with the air quality criteria *and recommended control techniques.*" § 108(c)(2), 1967 U.S. Code Cong. & Ad. News 523-24 (emphasis added).

In enacting the 1970 Act, Congress rejected several key aspects of the 1967 approach. Of key importance, Congress *deleted* the linkage between control techniques information and ambient air quality standards: instead of being consistent with the criteria *and* control techniques information, standards were henceforth to be based only on the "criteria," § 109(b)(1) – i.e., based only on direct health effects of air pollutants.

This conclusion is further confirmed by another change made by the 1970 Act. Specifically, in 1970 Congress shifted responsibility for ambient standard-setting from the states to EPA, and accordingly deleted the 1967 Act's requirement that criteria be issued "to the States." § 108(a)(2) ("EPA shall *issue* air quality criteria") (emphasis added). In sharp contrast, Congress *retained* the 1967 Act's requirement that *control techniques information* be issued "to the States and appropriate air pollution control agencies," § 108(b)(1), thus confirming that that information – and the non-health factors addressed in it – is not for use in *EPA's* standard-setting.

Finally, the 1970 Act deleted the 1967 Act's requirement that control techniques information include "cost-

effectiveness analyses." If Congress did not provide for such analyses to be included even in control techniques information, which under § 109(b)(1) is irrelevant to NAAQS-setting, there is no basis for asserting that such analyses are required or even permissible in establishing the NAAQS themselves.

1970 House and Senate Bills. Further confirmation of Congress's decision to exclude non-health factors is found in the evolution of the 1970 committee bills. First, the Senate bill provided for ambient air quality standards to be based on health, with no provision for consideration of non-health factors. S. Rep. 1196, 91st Cong., 2d Sess. 86 (1970). The Senate Committee noted that "[i]n the Committee discussions, considerable concern was expressed regarding the use of the concept of technical feasibility as the basis of ambient air standards." *Id.* at 2. The Senate Committee concluded that "the health of people is more important than the question of whether the early achievement of ambient air quality standards protective of health is technically feasible." *Id.* As Senator Muskie explained:

> The first responsibility of Congress is not the making of technological or economic judgments – or even to be limited by what is or appears to be technologically or economically feasible. Our responsibility is to establish what the public interest requires to protect the health of persons. This may mean that people and industries will be asked to do what seems to be impossible at the present time. But if health is to be protected, these challenges must be met.

116 Cong. Rec. 32901-02 (September 21, 1970). *See Union Electric*, 427 U.S. at 257 ("[The Act's] requirements are of a 'technology-forcing character,' and are expressly designed to force regulated sources to develop pollution control devices that might at the time appear to be economically or technologically infeasible.") (citation omitted).

Second, although the House bill adopted an approach weaker than that of the Senate bill, the conferees rejected the House approach. The House bill, though it did not expressly require or allow NAAQS to be based on non-health factors, did not include as strong a mandate for consideration of health as the Senate bill. 116 Cong. Rec. 19224 (June 10, 1970). Moreover, other provisions of the House bill provided for consideration of non-health factors in implementing the NAAQS.[6] In response, the conferees deleted any references that they believed would diminish public health protection:

> In respect to economic feasibility, it is clear again beyond any shadow of a doubt that Congress intended that this not be a factor insofar as

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[6] For example, the House bill had authorized EPA to file federal enforcement actions where NAAQS were not being met, and had provided that district courts would have jurisdiction to order appropriate relief, "giving due consideration to the practicability and to the technological and economic feasibility of complying with provisions of the [pollution control] plan established to implement such [ambient air quality] standards." 116 Cong. Rec. 19225 (House bill § 108(c)(4)). The conferees deleted that provision in favor of an enforcement authority not premised on practicability or technological and economic feasibility. 1970 Act § 113, 1970 U.S. Code Cong. & Ad. News 1966-68.

> the primary standards were concerned relating to public health. Economic feasibility was included in the House bill, it was hotly debated in conference and it was deleted.

Implementation of the Clean Air Act Amendments of 1970 – Part I, Hearings before the Subcommittee on Air and Water Pollution of the Senate Committee on Public Works (February 16-23, 1972), at 18-19 (remarks of Senator Eagleton, a 1970 Act conferee).

> On this question of an economic factor, I am as positive about this as a mortal can be, that was specifically written out of the bill because many hours were spent in conference debating the economic feasibility factor and the House had such language in the bill as:
>
> Giving due consideration to economic and technological feasibility of compliance.
>
> That appeared in more than one place in the House bill and it was stricken from the bill in conference to go back to the Senate version which had no economic factor as far as protection of public health was concerned.

Id. at 21 (remarks of Senator Eagleton).

In short, the evolution of the Senate and conference bills clearly shows that the absence of non-health factors from § 109(b)(1) was no accident, but reflects a deliberate congressional choice.

Post-1970 Congressional Action. Twice since 1970, Congress has enacted major overhauls of the Act – in 1977 and 1990. Yet, despite the longstanding agency and judicial interpretations construing the Act, Congress did not amend § 109 or 108 to allow or mandate consideration

of non-health factors in NAAQS-setting. To the contrary, Congress continued the 1970 Act's mandate that NAAQS be based on direct health effects of air pollutants, and instead made adjustments in the provisions governing implementation of NAAQS. *E.g.*, Pub. L. 95-95, § 129(b), 91 Stat. 746-47 (August 7, 1977) (adding § 172(a), which authorized attainment deadlines to be extended to 1982, with a possible further extension to 1987); Pub. L. 101-549, §§ 101-111, 104 Stat. 2399-2471 (November 15, 1990) (extensive amendments addressing designation of areas violating NAAQS, preparation of pollution control plans, and deadlines for attainment of NAAQS).

In 1977, Congress amended § 109 by adding a requirement for periodic review and revision of NAAQS at intervals of no more than five years. § 109(d). Far from changing § 109(b)(1)'s exclusive focus on direct health effects of air pollutants, Congress expressly reaffirmed that focus with an express cross-reference to § 109(b). § 109(d)(1).[7]

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[7] Section 109(d) also mandated a scientific review committee, which was to advise EPA (inter alia) "of any adverse public health, welfare, social, economic, or energy effects which may result from various strategies for attainment and maintenance of such national ambient air quality standards." § 109(d)(2)(C)(iv). Section 109(d) neither authorizes nor requires EPA to consider the § 109(d)(2)(C)(iv) factors in revising NAAQS, and the legislative history confirms that those factors were designed to be "of interest and assistance *to the States and to Congress* in fashioning future legislation." H.R. Rep. 294, 95th Cong., 1st Sess. 183 (1977), *reprinted in* 1977 Legislative History at 2650 (emphasis added).

In addition, the 1977 Amendments provided for consideration of non-health factors in various provisions of the Act, once again demonstrating that Congress knew how to incorporate such factors when it wished to do so. For example, the 1977 Amendments added § 317, 42 U.S.C. § 7617, which mandates an "economic impact assessment" in connection with certain specified proceedings, not including NAAQS, § 317(a), and even as to the covered proceedings cautions that the assessment requirement does not change the substantive factors EPA is required to consider. § 317(c).

Likewise, the 1990 Act added a mandate for hazardous air pollutant emission standards that expressly references cost:

> Emission standards promulgated under this subsection shall provide an ample margin of safety to protect public health in accordance with this section (as in effect before November 15, 1990), unless the Administrator determines that a more stringent standard is necessary to prevent, *taking into consideration costs, energy, safety, and other relevant factors*, an adverse environmental effect.

§ 112(f)(2)(A), 42 U.S.C. § 7412(f)(2)(A) (emphasis added). Though Congress thus knew full well how to incorporate non-health factors such as cost into EPA standard-setting, it made no such change in § 109(b)(1).

In short, the statute and its development overwhelmingly demonstrate the correctness of the D.C. Circuit's longstanding precedent holding that the Act's provisions governing primary NAAQS bar EPA from considering "any factor other than health effects relating to

pollutants in the air." App. 13 (internal quotations omitted). Accordingly, the cross-petitions seeking to reopen that long-settled issue should be denied.

IV. THE QUESTIONS PROPOSED IN THE CROSS-PETITIONS SHOULD BE REJECTED AS ARGUMENTATIVE.

In addition to raising questions the Court should not and need not entertain, the questions proposed in the cross-petitions are argumentative, and should be rejected on that ground as well. Sup. Ct. R. 14.1(a) (questions "should not be argumentative").

The question proposed by ATA's cross-petition assumes (by using the phrase "given that") that consideration of non-health factors would avoid constitutional nondelegation issues. As shown above, however, the Clean Air Act – an EPA's interpretation of the Act – are constitutional, regardless of whether consideration of non-health factors is prohibited, allowed or required. Part I.A, *supra*. Moreover, incorporation of non-health factors into § 109(b)(1) would broaden, not narrow, the scope of the congressional delegation. Part I.B, *supra*.

The question proposed by Appalachian Power's cross-petition makes at least three argumentative assumptions. First, it assumes that EPA's decisions under § 109 consist exclusively of "risk management" – words that appear nowhere in the statutory provisions governing NAAQS. Second, it assumes that NAAQS have "*broad* economic, environmental, and indirect public health consequences." (Emphasis added.) The validity of certain impacts alleged by opponents of the 1997 NAAQS (*e.g.*,

alleged environmental impacts of changes in mine tax revenues, *see* App. 20, and alleged reductions in personal income that allegedly affect health) is disputed by many, including ALA.

Finally, and most egregiously, Appalachian Power's issue assumes that in the two rulemakings at issue here, EPA faced "a range of standards that reflect *uncertain and indistinguishable* health risks." (Emphasis added.) The EPA decisions under review "are based on some of the best scientific information the Agency has ever been able to rely on in NAAQS decision-making. In particular, the science underlying these decisions is much more extensive and of much better quality than the science underlying the existing NAAQS for PM and ozone." 62 Fed. Reg. 38881 n.53 (July 18, 1997). The D.C. Circuit did not in any way question the validity of the science relied on by EPA, and on the contrary found that EPA's decision to set a fine particulate standard "easily" satisfied the statutory standard. App. 51. "Given EPA's statutory mandate to establish standards based on 'the latest scientific knowledge,' 42 U.S.C. §§ 7408(a)(2), 7409(d), the growing empirical evidence demonstrating a relationship between fine particle pollution and adverse health effects amply justifies establishment of new fine particle standards." *Id.*

Based on the science, EPA concluded that the 1997 NAAQS would each year prevent thousands of deaths, thousands of hospitalizations for respiratory and cardiopulmonary causes, tens of thousands of cases of reduced lung function and respiratory pain, and millions of days of missed work and restricted activity. ALA Pet. at 6, 12.

Appalachian Power's attempt to assume away these findings with an argumentatively worded question should be rejected.

V. THE COURT SHOULD REJECT CROSS-PETITIONERS' ARGUMENT THAT, INDEPENDENTLY OF ANY CROSS-PETITION, THE ISSUE CONCERNING NON-HEALTH FACTORS MAY STILL BE PRESENTED TO THE COURT.

Cross-petitioners ATA and Appalachian Power argue that their cross-petitions are unnecessary, because ATA and Appalachian Power allegedly can raise the non-health factors issue independently of any cross-petition. ATA Cross-Pet. at 27-30; Appalachian Power Cross-Pet. at 4. Indeed, Appalachian Power has even attempted to reformulate the nondelegation question presented by ALA, EPA, and Massachusetts in such a manner as to incorporate that issue. Appalachian Power Rsp. at i (asserting that nondelegation question should include consideration of "whether the court of appeals properly construed the scope of the Agency's discretion in defining [intelligible] . . . criteria."). To the contrary, as ALA has shown above, the non-health factors issue is not a part of – and is not necessary or helpful to resolution of – the constitutional nondelegation issue. Moreover, insertion of that issue into the case would not "preserve" the judgment below, but on the contrary would "change" it. *See* ATA Cross-Pet. at 27 (quoting *Jones v. United States*, 119 S. Ct. 2090, 2106 (1999)).

ATA argues that because EPA must (for reasons other than the lower court's nondelegation ruling) conduct

further proceedings in any event, cross-petitioners' proposed issue would not change or enlarge cross-petitioners' rights. ATA Cross-Pet. at 27-30. This argument is doubly flawed. First, it is open-ended: because § 109(d)(1) mandates cyclical EPA review of NAAQS at intervals not exceeding five years, EPA will *always* be facing the need to conduct further proceedings. Second, the judgment below did not simply require EPA to conduct further proceedings, but also defined requirements governing those proceedings. In particular, EPA must identify a "determinate criterion for drawing lines," App. 5, in a manner that considers only "health effects relating to pollutants in the air." App. 13 (citation omitted). Cross-petitioners' proposed question would (if cross-petitioners prevail) change these requirements, such that cross-petitioners would have an opportunity to argue on remand for consideration of non-health factors – and EPA would no longer be able to assert a lack of statutory authority to undertake such consideration. Indeed, Ohio argued below not only that EPA has authority under the Clean Air Act to consider non-health factors, but also that the Unfunded Mandates Reform Act *requires* the agency to exercise that authority by considering those factors. Ohio Opening Br. in D.C. Cir. No. 97-1440 at 15 ("the CAA, in conjunction with UMRA, affirmatively *compels* EPA to consider cost and benefits") (emphasis added). *See also* p. 3, *supra* (citing assertions by cross-petitioners in this Court that EPA must consider non-health factors).

In short, cross-petitioners' argument concerning non-health factors seeks both a change in – and an enlargement of cross-petitioners' rights under – the D.C. Circuit's judgment. Accordingly, cross-petitioners' assertion

that they may raise that argument independently of a cross-petition should be rejected.

CONCLUSION

For the foregoing reasons, the cross-petitions of ATA and Appalachian Power should be denied.[8]

DATED: April 12, 2000.

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[8] ALA takes no position on the cross-petition of Citizens for Balanced Transportation.

Supreme Court
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Nos. 99-1426, 99-1431 and 99-1442

In the Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.,
CROSS-PETITIONERS

v.

CAROL M. BROWNER, ADMINISTRATOR OF THE
ENVIRONMENTAL PROTECTION AGENCY, ET AL.

APPALACHIAN POWER COMPANY, ET AL.,
CROSS-PETITIONERS

v.

UNITED STATES ENVIRONMENTAL PROTECTION
AGENCY, ET AL.

CITIZENS FOR BALANCED TRANSPORTATION, ET AL.,
CROSS-PETITIONERS

v.

CAROL M. BROWNER, ADMINISTRATOR OF THE
ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON CONDITIONAL CROSS-PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL CROSS-RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals properly reaffirmed the long-standing principle that, in setting and revising National Ambient Air Quality Standards (NAAQS) under Section 109 of the Clean Air Act, the Environmental Protection Agency (EPA) may not consider the costs, technical feasibility, or other alleged effects of implementing measures to attain the NAAQS (Nos. 99-1426 and 99-1431).

2. Whether the court of appeals properly resolved various claims, by postponing decision or rejecting them outright, that EPA's primary and secondary NAAQS for fine particulate matter ($PM_{2.5}$) are inadequate to protect public health and welfare (No. 99-1442).

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In the Supreme Court of the United States

No. 99-1426

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.,
CROSS-PETITIONERS

v.

CAROL M. BROWNER, ADMINISTRATOR OF THE
ENVIRONMENTAL PROTECTION AGENCY, ET AL.

No. 99-1431

APPALACHIAN POWER COMPANY, ET AL.,
CROSS-PETITIONERS

v.

UNITED STATES ENVIRONMENTAL PROTECTION
AGENCY, ET AL.

No. 99-1442

CITIZENS FOR BALANCED TRANSPORTATION, ET AL.,
CROSS-PETITIONERS

v.

CAROL M. BROWNER, ADMINISTRATOR OF THE
ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON CONDITIONAL CROSS-PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL CROSS-RESPONDENTS IN OPPOSITION

STATEMENT

The federal government's petition for a writ of certiorari (No. 99-1257) seeks review of the court of appeals' ruling that the Environmental Protection Agency (EPA) has interpreted the Clean Air Act (CAA) in a way that effects an unconstitutional delegation of legislative power. 99-1257 Pet. I. The petition also challenges the court of appeals' premature and mistaken ruling limiting how EPA may implement one of the two remanded National Ambient Air Quality Standards (NAAQS) at issue—the ozone NAAQS. *Ibid.* The cross-petitions seek to introduce two sets of unrelated issues involving particular details of the underlying rulemakings.

First, two groups of industrial interests, the American Trucking Associations, *et al.* (ATA), and Appalachian Power Company, *et al.* (APC), ask this Court to review the court of appeals' unanimous statutory ruling that, in setting and revising NAAQS, EPA is precluded from considering the economic costs and effects of implementing those standards. ATA Cross-Pet. i; APC Cross-Pet. i. That ruling reaffirms EPA's 30-year-old construction of the CAA and a series of unanimous judicial decisions stretching over 20 years. See 99-1257 Pet. App. 19a-21a.

Second, a group of environmental interests, Citizens for Balanced Transportation, *et al.* (CBT), seeks review of particular challenges to EPA's selection of the 24-hour primary NAAQS for particulate matter (PM) of 2.5 microns or less ($PM_{2.5}$) and its selection of the secondary NAAQS for $PM_{2.5}$. CBT Cross-Pet. i. The court of appeals concluded that it could not reach most of those issues in light of its remand to the agency. See 99-1257 Pet. App. 4a-5a.

We describe below the court's reasoning on the issues raised by the cross-petitions.

1. The court of appeals' decision in this case addresses a broad range of industry and environmental challenges to EPA's ozone and PM NAAQS. Among other things, the decision reiterates the long settled principle that, "in setting NAAQS under § 109(b) of the Clean Air Act, the EPA is not permitted to consider the cost of implementing those standards." 99-1257 Pet. App. 19a. The court of appeals has consistently held that EPA must set NAAQS based on the "health effects relating to pollutants in the air" and not on alleged costs or other effects that may result from implementation of the NAAQS. *Natural Resources Defense Council, Inc.* v. *EPA*, 902 F.2d 962, 973 (D.C. Cir. 1990) (EPA need not consider alleged health effects associated with unemployment), cert. denied, 498 U.S. 1082 (1991); see also *Lead Indus. Ass'n* v. *EPA*, 647 F.2d 1130, 1148 (D.C. Cir.), cert. denied, 449 U.S. 1042 (1980).

The court expressly considered and rejected ATA's and APC's arguments that it should reconsider its decision in *Lead Industries* because that case was decided without the benefit of this Court's decision in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The court explained:

> The *Lead Industries* decision was made in *Chevron* step one terms, * * * as the post-*Chevron* progeny of *Lead Industries* have made clear. [*Natural Resources Defense Council, Inc.* v. *EPA*], 902 F.2d [962,] 973 [(D.C. Cir. 1990), cert. denied, 498 U.S. 1082 (1991)] ("Consideration of costs . . . would be flatly inconsistent with the statute, legislative history and case law on this point"); *NRDC* v. *EPA*,

824 F.2d 1146, 1158-59 (D.C. Cir. 1987) (in banc) ("*Vinyl Chloride*") ("[S]tatute on its face does not allow consideration of technological or economic feasibility.").

99-1257 Pet. App. 19a-20a.

The court of appeals additionally considered and rejected the argument that, even if EPA could not consider costs in initially setting NAAQS, it could do so when revising NAAQS. 99-1257 Pet. App. 20a. Finally, the court rejected the industrial groups' argument that Congress's directions to the Clean Air Scientific Advisory Committee (CASAC) to advise EPA on, among other things, "any adverse public health, welfare, social, economic, or energy effects which may result from various strategies for attainment and maintenance" of NAAQS, CAA, § 109(d)(2)(C)(iv), 42 U.S.C. 7409(d)(2)(C)(iv), signals that EPA should consider those factors in revising NAAQS. 99-1257 Pet. App. 21a. Instead, the CAA directs CASAC to provide that advice in light of EPA's separate duty to give the States information on control strategies. *Ibid.*

2. CBT challenged as arbitrary and capricious EPA's decision not to set a more stringent 24-hour primary NAAQS and more stringent 24-hour and annual secondary NAAQS for $PM_{2.5}$. Because the court of appeals remanded the $PM_{2.5}$ NAAQS on nondelegation grounds, the court of appeals did not rule on CBT's claims except in one narrow respect. 99-1257 Pet. App. 5a, 56a. In the final rule, EPA had announced its decision to address adverse effects that fine PM may have on visibility by establishing secondary $PM_{2.5}$ NAAQS (at the same levels as the primary $PM_{2.5}$ NAAQS) and by implementing the Regional Haze Program described in Section 169A of the CAA, 42 U.S.C 7491. 99-1257

Pet. App. 56a; 62 Fed. Reg. 38,652, 38,683 (1997). The court of appeals rejected CBT's argument that Section 109(b)(2), 42 U.S.C. 7409(b)(2), requires EPA to set secondary NAAQS that will eliminate *all* adverse effects on visibility and deprives EPA of authority to address some impairment of visibility through another program. 99-1257 Pet. App. 57a. The court explained that the CAA included the Regional Haze Program to address adverse effects on visibility that may persist in areas such as national parks "notwithstanding attainment and maintenance of all [NAAQS]." *Ibid.*

3. Neither ATA, APC, nor any other party sought rehearing on the cost issue. CBT filed petitions for rehearing and rehearing en banc as to all of its claims. CBT's petitions were denied without dissent. 99-1257 Pet. App. 71a, 101a.

ARGUMENT

As our petition for a writ of certiorari explains, the court of appeals has erred in two fundamental respects: (1) it remanded EPA's revised PM and ozone NAAQS based on an aberrant notion of the nondelegation doctrine (99-1257 Pet. 9-10, 11-19); and (2) it prematurely and mistakenly decided how EPA should eventually implement the ozone NAAQS (99-1257 Pet. 19-30). As our reply brief explains, respondents have failed to provide persuasive reasons against review. Instead, they have recharacterized the court of appeals' decision in ways that obfuscate the issues. The cross-petitions at issue here add another layer of complexity and confusion. They raise no issue that would independently warrant review or that would assist the Court in resolving the core nondelegation issue. To the contrary, the cross-petitions would complicate the case with issues that, on the one hand, have long been settled or,

on the other hand, the court of appeals had no occasion to reach.

1. The flaws in the court of appeals' nondelegation analysis are not difficult to discern. This Court has developed the nondelegation doctrine to preserve the Constitution's separation of governmental powers. *E.g.*, *Mistretta* v. *United States*, 488 U.S. 361, 371-372 (1989). It prohibits *Congress* from vesting its legislative power in an executive branch agency. *Ibid.* The court of appeals erred because it misconceived the nondelegation doctrine as a judicial check on agency discretion. See 99-1257 Pet. App. 14a. The court of appeals' decision confuses two distinct lines of inquiry and, in the process, wrongly sets aside legitimate agency action. The Court should therefore correct that fundamental misconception and remand the case to the court of appeals with directions to review the EPA's rules under the correct standard of review. See 99-1257 EPA Reply Br. 2-6.

ATA and APC urge a different course. They argue that the Court should *broaden* the inquiry and use the court of appeals' mistake as a vehicle for setting aside long-settled statutory principles that have guided EPA's implementation of the CAA for 30 years. They specifically challenge the firmly established principle that EPA should set NAAQS based on the public health and welfare effects caused by the pollutant's presence in the ambient air and not on the potential economic costs or other alleged effects of implementing the NAAQS. See ATA Cross-Pet. 14-27; APC Cross-Pet. 14-25. The court of appeals was divided on the nondelegation issue, but it unanimously rejected the industrial groups' arguments on this point and reiterated its past holding that the CAA directs that questions of economic costs and the other effects of implementing

NAAQS can be considered only as part of the implementation process. 99-1257 Pet. App. 19a-21a.

The Court should decline ATA's and APC's invitation to complicate consideration of the nondelegation issue. The court of appeals' decision is correct as to the issue they raise. Moreover, it rests on settled law that has long guided the actions of EPA, Congress, and the courts. Contrary to ATA's urgings, the constitutional question of whether Congress has vested EPA with legislative power is not "tightly intertwined" (ATA Cross-Pet. 7) with the statutory issue of whether Congress directed EPA to set NAAQS based solely on health and welfare effects of ambient pollution concentrations.

a. Congress introduced the NAAQS-based framework through the enactment of the Clean Air Act Amendments of 1970.[1] Since that time, EPA has consistently applied Section 109 according to its terms, which require EPA to set primary NAAQS at levels "requisite to protect the public health." CAA § 109(b)(1), 42 U.S.C. 7409(b)(1). EPA has consistently rejected the notion that, when promulgating NAAQS, it may consider costs, technical feasibility, or related factors.[2] ATA and APC ask this Court to overturn 20

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[1] As this Court has recognized, Congress was dissatisfied with progress under the Air Quality Act of 1967, Pub. L. No. 90-148, § 2, 81 Stat. 485, and enacted the Clean Air Act Amendments of 1970 to make far-reaching changes in the Nation's approach to air pollution control. *Train* v. *Natural Resources Defense Council, Inc.*, 421 U.S. 60, 64 (1975); see *Union Electric Co.* v. *EPA*, 427 U.S. 246, 256-257 (1976).

[2] When promulgating the first NAAQS, Administrator Ruckelshaus announced that no revisions were made to the proposed NAAQS in response to comments questioning the feasibility of their implementation. He stated that the CAA "does not permit

years of court of appeals precedent—decided in the course of reviewing predecessor NAAQS—upholding that interpretation.[3]

As ATA acknowledges (Cross-Pet. 5-6), this Court has repeatedly declined to review the issue that ATA and APC press here.[4] There is no reason to reach a different result now. ATA offers no support for its claim that the court of appeals itself "now lacks confidence" in the holding of *Lead Industries* (Cross-Pet. 17-18). To the contrary, the court of appeals has repeatedly rejected ATA's and APC's principal arguments without a single dissent.[5] The cross-petitions do not raise a controversial issue; the entire District of

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any factors other than health to be taken into account in setting the primary standards." 36 Fed. Reg. 8186 (1971). See also, *e.g.*, 62 Fed. Reg. at 38,683-38,688 (detailed response to comments on this issue in the PM rulemaking).

[3] *American Lung Ass'n* v. *EPA*, 134 F.3d 383, 389 (D.C. Cir. 1998); *Natural Resources Defense Council, Inc.* v. *EPA*, 902 F.2d 962, 973 (D.C. Cir. 1990), cert. denied, 498 U.S. 1082 (1991); *American Petroleum Inst.* v. *Costle*, 665 F.2d 1176, 1185 (D.C. Cir. 1981), cert. denied, 455 U.S. 1034 (1982); *Lead Indus. Ass'n* v. *EPA*, 647 F.2d 1130, 1148 (D.C. Cir.), cert. denied, 449 U.S. 1042 (1980); see also *Natural Resources Defense Council, Inc.* v. *EPA*, 824 F.2d 1146, 1158-1159 (D.C. Cir. 1987) (en banc) (*Vinyl Chloride*).

[4] See Pet. at 8-11, *St. Joe Minerals Corp.* v. *EPA*, cert. denied, 449 U.S. 1042 (1980) (No. 80-483); Pet. at 18-23, *American Petroleum Inst.* v. *Gorsuch*, cert. denied, 455 U.S. 1034 (1982) (No. 80-871).

[5] Since 1980, 15 judges of the District of Columbia Circuit—including Judge Bork writing for the court en banc in *Vinyl Chloride*—have expressed approval of EPA's interpretation. Contrary to APC's assertion (Cross-Pet. 24), nothing in any of the decisions after *Lead Industries* remotely suggests that the court of appeals felt "its hands were tied" by that decision. See cases cited in note 3, *supra*.

Columbia Circuit has long viewed the matter as settled. See 99-1257 Pet. App. 19a. Indeed, if ATA and APC thought otherwise, they should have challenged the panel's unanimous ruling through a petition for rehearing en banc.

The court of appeals and EPA have correctly concluded that Congress "has directly spoken to the precise question at issue." *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984). Section 109(b)(1) of the CAA directs EPA to set primary NAAQS at a level "requisite to protect the public health." See 42 U.S.C. 7409(b)(1). It does not direct EPA to consider economic and other costs when setting NAAQS, and there is no basis for inferring that Congress intended those factors to be considered at that initial stage of the regulatory process. The language and structure of the 1970 CAA demonstrate that the overriding purpose of NAAQS promulgation is to determine, as the first step of the CAA regulatory program, the ambient air quality standards that are necessary to protect the public health and welfare. Neither Section 108, which specifies the kinds of factual information upon which NAAQS must be based, nor Section 109, which contains the legal test NAAQS must meet, discusses or otherwise suggests any consideration of cost or technical feasibility. See *Lead Indus. Ass'n*, 647 F.2d at 1149; *Vinyl Chloride*, 824 F.2d at 1158.[6]

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[6] The States of Ohio, Michigan, and West Virginia suggest in their brief supporting the cross-petitions (Midwest States Br. 9-13) that there is a broader inconsistency in the District of Columbia Circuit's case law with respect to whether administrative agencies ever have authority to consider factors other than those explicitly mentioned in enabling legislation. This alleged conflict goes beyond any question presented in a timely petition or cross-peti-

Section 109(b)(1) specifically requires NAAQS to be "based on" the air quality "criteria" that EPA issues under Section 108. 42 U.S.C. 7409(b)(1). Section 108(a)(2), in turn, limits the kind of information to be included in the "criteria" to "the latest scientific knowledge" about effects on health and welfare "which may be expected from the presence of such pollutant in the ambient air." 42 U.S.C. 7408(a)(2). Section 108(a)(2) makes no mention whatsoever of effects from *implementing* the NAAQS—it mentions only effects resulting from the presence of a criteria pollutant in the air. That silence is telling in light of other sections of the Clean Air Act Amendments of 1970 where Congress expressly provided that EPA should consider costs and similar factors in making decisions.[7]

The structure of the CAA also indicates that EPA should promulgate NAAQS based on health and welfare effects and not on the basis of costs or alleged adverse effects that may result from their implemen-

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tion. Moreover, the question cannot be addressed in such abstract terms, because the answer depends on the purpose and context of a particular statute. The principle of *expressio unius est exclusio alterius* is merely one tool of statutory construction, not a rule of law, see *Shook* v. *District of Columbia Fin. Responsibility & Management Assistance Auth.*, 132 F.3d 775, 782 (D.C. Cir. 1998); *Longview Fibre Co.* v. *Rasmussen*, 980 F.2d 1307, 1313 (9th Cir. 1992), and therefore its application can be expected to differ from one circumstance to another.

[7] *E.g.*, Clean Air Act Amendments of 1970, Pub. L. No. 91-604, § 110(e)(1), 84 Stat. 1682 (authorizing EPA to grant States up to a two-year extension of a NAAQS attainment date if necessary technology is not available); § 111(a)(1), 84 Stat. 1683 (requiring consideration of economic and technological feasibility in establishing standards of performance for new stationary sources); § 231(b), 84 Stat. 1704 (authorizing consideration of economic and technical feasibility in establishing aircraft emission standards).

tation. As this Court recognized long ago, the CAA is a "technology-forcing" statute that sets ambitious goals to protect public health and welfare. See *Train* v. *Natural Resources Defense Council, Inc.*, 421 U.S. 60, 91 (1975). In that respect, Congress has indicated expressly when and to what extent costs and implementation effects shall be considered in the regulatory process. See *Union Elec. Co.* v. *EPA*, 427 U.S. 246 (1976).[8]

For example, States are entitled to develop State Implementation Plans (SIPs) governing how NAAQS will be implemented within their borders. See CAA § 110, 42 U.S.C. 7410. States may properly consider the costs of NAAQS implementation when formulating the SIPs, and EPA may not override those judgments so long as the SIP will achieve attainment of the NAAQS. See *Union Elec. Co.*, 427 U.S. at 256-269.[9] The Court also recognized that the CAA does not allow a State to rely on those considerations at the expense of meeting the statutory deadlines for attaining the national health-based standards. *Id.* at 266-269.[10] The Court's

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[8] See 427 U.S. at 269 ("Technology forcing is a concept somewhat new to our national experience and it necessarily entails certain risks. But Congress considered those risks in passing the 1970 Amendments and decided that the dangers posed by uncontrolled air pollution made them worth taking.").

[9] See, *e.g.*, 427 U.S. at 266 ("Perhaps the most important forum for consideration of claims of economic and technological infeasibility is before the state agency formulating the implementation plan. So long as the national standards are met, the State may select whatever mix of control devices it desires * * * and industries with particular economic or technological problems may seek special treatment in the plan itself.").

[10] See, *e.g.*, 427 U.S. at 268-269 ("In short, the [Clean Air Act Amendments of 1970] offer ample opportunity for consideration of claims of technological and economic infeasibility. Always, how-

longstanding decision in *Union Electric*, describing the CAA as a "technology-forcing" statute and explaining how cost considerations are introduced into the regulatory scheme on a State-by-State basis in the implementation process, would make little sense if EPA had to promulgate NAAQS based on an analysis of costs and related implementation factors at the outset of the regulatory process.[11]

As the court of appeals has repeatedly noted, the legislative history of the 1970 Amendments confirms the paramount importance of setting primary NAAQS based solely on the health effects posed by the pollutant in the ambient air. See *Vinyl Chloride*, 824 F.2d at 1158; *Lead Indus. Ass'n*, 647 F.2d at 1149. For example, the Senate report accompanying the 1970 Amendments states:

> In the Committee discussions, considerable concern was expressed regarding the use of the concept of technical feasibility as the basis of ambient air standards. The Committee determined that 1) the health of people is more important than the question of whether the early achievement of ambient air quality standards protective of health is technically feasible; and, 2) the growth of pollution load in many

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ever, care is taken that consideration of such claims will not interfere substantially with the primary goal of prompt attainment of the national standards. * * * Congress plainly left with the States, so long as the national standards were met, the power to determine which sources would be burdened by regulation and to what extent.").

[11] Section 110 of the 1970 CAA, which was construed by the Court in *Union Electric*, has since undergone considerable revision, but the principles set forth above have not been altered. See *Virginia* v. *EPA*, 108 F.3d 1397, 1407-1409 (D.C. Cir. 1997); 42 U.S.C. 7410(k).

> areas, even with application of available technology, would still be deleterious to public health.
>
> Therefore, the Committee determined that existing sources of pollutants either should meet the standard of the law or be closed down * * *.

S. Rep. No. 1196, 91st Cong., 2d Sess. 2-3 (1970). In other words, the primary NAAQS should be based on health effects rather than economic or technical feasibility, and as a result, the NAAQS have a "technology-forcing" effect. See *Train*, 421 U.S. at 91; *Union Elec. Co.*, 427 U.S. at 257, 269.

At bottom, APC urges this Court to revisit the long-settled question of whether EPA should consider costs and other alleged implementation effects in setting NAAQS because, in APC's view, its preferred approach would be "wise social policy." See, *e.g.*, APC Cross-Pet. 6-7. But Congress concluded otherwise, and Congress's choice was certainly a rational one. Congress reasonably concluded that NAAQS should be based on health and welfare considerations alone so that Congress and the public know that EPA's judgments on the health and welfare threats posed by particular criteria pollutants are not compromised by considerations of economic and technical feasibility. As this Court recognized in *Union Electric*, Congress provided the States with flexibility in the implementation process to consider the economic and technical feasibility of attainment, 427 U.S. at 266-269, but it reserved to itself the prerogative of deciding – as a matter of legislative choice – whether and how to alter the statutory scheme

if public health needs should prove to conflict with an industry's economic viability.[12]

Congress has since recognized and exercised that prerogative. See 62 Fed. Reg. at 38,685. In the course of formulating the Clean Air Act Amendments of 1977, Congress was well aware that some areas of the country had been unable to attain some of the NAAQS. See, *e.g.*, H.R. Rep. No. 294, 95th Cong., 1st Sess. 207-217 (1977). It was also aware that some of the NAAQS criteria pollutants might be non-threshold pollutants and that significant scientific uncertainties are inherent in setting health-based standards. See *id.* at 43-51, 110-112. In response, Congress made significant changes in the provisions for implementing the NAAQS, including, for example, an extension of the deadline for attaining the ozone NAAQS. It also amended Sections 108 and 109 of the Act to require periodic review and revision of NAAQS and to establish CASAC. Nevertheless, Congress did not change the substantive criteria for setting and revising NAAQS. See 62 Fed. Reg. at 38,685 & n.66 (describing the 1977 Amendments).[13]

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[12] See *Lead Indus. Ass'n*, 647 F.2d at 1150 ("if there is a problem with the economic or technological feasibility of the lead standards, * * * any * * * party affected by the standards, must take its case to Congress, the only institution with the authority to remedy the problem"); 99-1257 Pet. App. 68a-69a (Tatel, J., in dissent, noting the role of politically accountable States in implementing NAAQS and the availability of congressional relief).

[13] In addition to requiring CASAC to advise EPA on issuing new or revised criteria and NAAQS, 42 U.S.C. 7409(d)(2)(B), Congress separately charged CASAC with advising EPA on implementation effects, 42 U.S.C. 7409(d)(2)(C). But that does not mean, as APC contends (Cross-Pet. 22), that EPA is to consider these effects in setting or revising NAAQS. See 99-1257 Pet. App. 21a; p. 4, *supra*. The legislative history removes any doubt on that matter. The House Report indicates that Congress did "not intend

Congress exercised that prerogative again in 1990. The Clean Air Act Amendments of 1990 responded to persistent nonattainment problems by adjusting the scheme for their implementation. See, *e.g.*, CAA §§ 181-192, 42 U.S.C. 7511-7514a. Significantly, Congress was fully aware of how NAAQS are promulgated, and it did not change the legal standard on which NAAQS are based. To the contrary, both the House and Senate Reports accompanying the 1990 Amendments expressly reflect the understanding that primary NAAQS are to be "set at a level that 'protects the public health with an adequate margin of safety,' *without regard to the economic or technical feasibility of attainment.*" H.R. Rep. No. 490, 101st Cong., 2d Sess., Pt. 1, at 145 (1990) (emphasis added); accord S. Rep. No. 228, 101st Cong., 1st Sess. 5 (1989). Congress's actions confirm that the court of appeals and EPA have correctly discerned congressional intent to preclude consideration of economic and technical feasibility in setting and revising NAAQS. Cf. *Bob Jones Univ.* v. *United States*, 461 U.S. 574, 600-602 (1983) (Congress "affirmatively manifested its acquiescence" in IRS policy by articulating the policy in committee reports accompanying related legislation); *Red Lion Broad. Co.* v. *FCC*, 395 U.S. 367, 381 (1969) ("the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong, especially when Congress has refused to alter the administrative construction").

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this provision to be used as a basis for the Administrator to disapprove any State's plan," but "may be of interest and assistance to the States and to Congress in fashioning future legislation." H.R. Rep. No. 204, *supra*, at 183.

ATA attempts to overcome the overwhelming evidence of congressional intent by drawing analogies from this Court's decision in *Industrial Union Department* v. *American Petroleum Institute.*, 448 U.S. 607 (1980). See ATA Cross-Pet. 15-16. That case, however, involves a different statute, with different language, that creates an entirely different regulatory program. The Occupational Safety and Health Act (OSH Act), 29 U.S.C. 651 *et seq.*, directs the Secretary of Labor to establish "occupational safety and health standard[s]," 29 U.S.C. 655(b), that are directly applicable to industrial employers and that are directly enforced by federal officials. 29 U.S.C. 658-659. The OSH Act *expressly* requires the Secretary to consider whether standards dealing with toxic materials or harmful physical agents are "feasible." 29 U.S.C. 655(b)(5).

The CAA's NAAQS promulgation process, by contrast, is simply the first step in a federal-state regulatory program and does not create standards that are themselves directly applicable to any air pollution source. The CAA directs EPA to set NAAQS at levels of air quality "requisite" to protect public health and welfare, but the CAA empowers the States to determine appropriate emission limitations and other controls on individual air pollution sources. See generally *Train, supra*; *Union Elec. Co., supra.* Unlike the OSH Act scheme, the CAA requires the Administrator to determine, as an initial matter, the exposure limitations necessary to protect health and welfare and leaves to the States discretion to consider—consistent with their obligation to meet the attainment deadlines—the economic or technological feasibility of compliance. See *Union Elec. Co.*, 427 U.S. at 259 (quoting S. Rep. No. 1196, 91st Cong., 2d Sess. 2-3 (1970)).

ATA's and APC's reliance on the court of appeals' en banc decision in *Vinyl Chloride*, 824 F.2d at 1158-1159, is similarly misplaced. See ATA Cross-Pet. 15-18; APC Cross-Pet. 9-10, 19. That decision in no way "strongly suggests" that the District of Columbia Circuit "now lacks confidence" in its *Lead Industries* decision. ATA Cross-Pet. 17-18. To the contrary, the court concluded that EPA should consider economic and technical feasibility when setting individual *emission standards* for specific hazardous air pollutants under Section 112 of the CAA, 42 U.S.C. 7412. It expressly distinguished Section 109's method for promulgating NAAQS. Writing for the en banc court, Judge Bork explained that the language and structure of the CAA support the conclusion that "Congress simply did not intend the economics of pollution control to be considered in [Section 109's] scheme of ambient air regulations." 824 F.2d at 1159.[14]

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[14] We note that EPA attempts to estimate the costs and benefits of implementing NAAQS as part of its Regulatory Impact Analysis (RIA), but it does so only for informational and implementation planning purposes and not as a part of its standard setting process. See 62 Fed. Reg. at 38,702; C.A. App. (PM) 3461-3462. ATA and APC rely selectively on those estimates to create a distorted picture of the potential costs and benefits of the NAAQS in this case. For example, APC and ATA cite EPA's estimate of the cost of fully attaining the revised PM standards ($37 billion) without mentioning EPA's estimate that those standards would produce quantifiable benefits of $20 to $110 billion. Compare APC Cross-Pet. 13 n.23 and ATA Cross-Pet. 4 with C.A. App. (Ozone) 2925. Nor does either mention EPA's estimate that the *net* quantifiable benefits to be derived from only partial attainment of the combination of the revised PM and ozone NAAQS would range from $9.5 to $96 billion. C.A. App. (PM) 3488. Furthermore, it is difficult, if not impossible, for EPA to account for the future development of innovative control technologies when it sets or revises NAAQS. C.A. App. (PM) 3471-3472. Because of the technology-forcing character of the NAAQS, EPA has historically

b. As the foregoing discussion shows, the ATA and APC cross-petitions do not present an issue that would warrant review in its own right: The court of appeals has repeatedly and correctly rejected ATA's and APC's arguments; those rulings have not produced any dissent; this Court has repeatedly declined to review the issue; and ATA and APC did not seek relief from the en banc court before petitioning for a writ of certiorari yet again. ATA nevertheless argues that this Court should combine its review of the nondelegation issue and this particular statutory issue because the issues are "inextricably intertwined." ATA Cross-Pet. 7; see also APC Cross-Pet. 4 (cost issue is "fairly within the scope of the initial petitions"). That assertion is correct only in the haphazard sense that a fishing line might become intertwined with a tree limb. Enlarging the grant would complicate an already complex case and would require the Court to disentangle inquiries that are properly separate and that the court of appeals treated as distinct. Indeed, the court of appeals panel was divided on the nondelegation issue, but unanimous on the supposedly "intertwined" statutory issue that ATA and APC present.

ATA concedes, in response to our petition, that Section 109 of the CAA itself does not violate the nondelegation doctrine. 99-1257 ATA Br. 15 (Section 109 is "undisputedly" constitutional); see also 99-1257 APC Br. 8 ("The court did *not* hold the statute itself unconstitutional."). Significantly, ATA does not contest our showing (99-1257 Pet. 11-16) that the CAA provides EPA with sufficient statutory direction to avoid delegating legislative power. See, *e.g.*, *Mistretta* v.

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*over*estimated the actual cost of their implementation and attainment. See *ibid.*

United States, 488 U.S. 361, 372-373 (1989). Instead, ATA defends the court of appeals' decision on the ground that EPA's "interpretation" of the CAA violates the nondelegation doctrine. See 99-1257 ATA Br. 11; 99-1257 APC Br. 10-11, 13; see also 99-1257 Pet. App. 4a ("we find that the construction of the Clean Air Act on which EPA relied in promulgating the NAAQS at issue here effects an unconstitutional delegation of legislative power").

Our petition takes specific issue with that proposition. See 99-1257 Pet. 16. The nondelegation doctrine is a check on Congress's grant of legislative powers and not—as the court of appeals and cross-petitioners would have it—a mechanism for controlling an agency's exercise of discretion. See *ibid.* We are hardly alone in that view. See, *e.g.*, 99-1257 Pet. App. 94a (Silberman, J., dissenting from the denial of rehearing en banc) ("Th[e] purpose [of the nondelegation doctrine] is, of course, to ensure that *Congress* makes the crucial policy choices that are carried into law."); *id.* at 98a (Tatel, J., joined by Edwards, C.J., and Garland, J., dissenting from denial of rehearing en banc) ("For purposes of constitutional analysis, we thus have no need to require that EPA state 'a far more determinate basis for decision' beyond the intelligible principle Congress provided in the Clean Air Act".).

We urge the Court to correct that basic conceptual error and, in accordance with its usual practice, return the case to the court of appeals so that the court can conclude its task of properly evaluating EPA's rulemakings under the statutory arbitrary and capricious standard set out in Section 307(d)(9) of the CAA, 42 U.S.C. 7607(d)(9). The Court has no occasion to venture further by undertaking belatedly to decide anew a

question of statutory construction that the court of appeals and Congress properly settled long ago.

ATA presses the Court to go further based on its inaccurate characterization of what the court of appeals decided. ATA argues that "the court below was forced to consider constitutional nondelegation issues because that court had misconstrued the Clean Air Act in *Lead Industries* and subsequent cases." ATA Cross-Pet. 5. ATA's characterization is fantasy. This case generated six opinions on panel review and petition for rehearing and rehearing en banc, and *not a single judge on the District of Columbia Circuit* expressed ATA's view of the case. Rather, the panel majority and dissenting judges treated the nondelegation issue and ATA's statutory issue as distinct and separate questions.

Specifically, the panel majority declared EPA's actions unconstitutional without reference to *Lead Industries*. 99-1257 Pet. App. 4a. The majority directed EPA "to develop a construction of the act that satisfies this constitutional requirement," *ibid.*, and it offered comment respecting EPA's options on remand, observing that "[c]ost-benefit analysis * * * is not available under decisions of this court," *id.* at 14a-15a. But the panel considered ATA's statutory issue as a separate question, and the panel *unanimously* reaffirmed the correctness of *Lead Industries*, *id.* at 19a-21a. ATA did not challenge the panel's reaffirmation of *Lead Industries* through a petition for rehearing en banc. There is no merit to ATA's assertion that the nondelegation issue and the *Lead Industries* issue are "inextricably intertwined." ATA Cross-Pet. 7.

The fundamental question here remains whether the nondelegation doctrine provides a constitutional limitation on an agency's action. See 99-1257 Pet. App. 4a. If we are correct that the nondelegation doctrine imposes

a separation of powers limitation on Congress – and not a limitation on an agency's exercise of administrative discretion—then this Court should reverse the court of appeals' decision and remand the case to that court to reevaluate EPA's actions under the proper legal standard with the care that befits these important rulemakings. If, to the contrary, the court of appeals correctly applied the nondelegation doctrine, this Court should affirm the court's judgment remanding the cases to EPA so that the agency can "develop a construction of the act that satisfies this constitutional requirement." *Ibid.* In either event, there is no reason for this Court to decide ATA's statutory challenge. The nondelegation ruling and that statutory challenge involve two distinct issues—one controversial and one not. They are related only in the inchoate sense that "everything is related to everything else." *California Div. of Labor Standards Enforcement* v. *Dillingham Const., N.A., Inc.*, 519 U.S. 316, 335 (1997) (Scalia, J., concurring).[15]

2. CBT's challenges to the 24-hour primary NAAQS for $PM_{2.5}$ should be denied because the issues CBT raises were not addressed by the court below. The

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[15] In deference to the Court's certiorari standards, the federal petitioners have limited their petition for a writ of certiorari to the nondelegation and the "Subpart 2" issues. They have not challenged the court of appeals' other adverse rulings, even though those rulings – such as the court's decision that EPA must evaluate the alleged health benefits of smog (99-1257 Pet. App. 44a-49a) – stand on a more dubious footing than the settled question that ATA and APC seek to raise. The federal petitioners, unlike the cross-petitioners here, have limited their petition to issues that have broader importance and independently meet this Court's standards for certiorari. The constitutional and finality issues that the federal petition presents raise fundamental issues that arise in every case in which a court reviews a federal agency's administration of a regulatory program.

court of appeals concluded that its remand of the ozone and $PM_{2.5}$ NAAQS on nondelegation grounds precluded resolution of most of the other challenges before it, including CBT's challenge to the 24-hour $PM_{2.5}$ primary NAAQS. See 99-1257 Pet. App. 4a-5a. There is no warrant for this Court to address an issue that the court of appeals did not reach.[16]

CBT's challenge to the secondary standards for $PM_{2.5}$ should also be denied. The secondary $PM_{2.5}$ NAAQS, like the 24-hour primary $PM_{2.5}$ NAAQS, were remanded to EPA by the court of appeals for reconsideration in light of that court's holding on nondelegation. Thus, the court below did not reach "the main thrust" of CBT's challenge, 99-1257 Pet. App. 56a, and there is no reason

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[16] CBT's challenges are, in any event, without merit. CBT's assertion that the 24-hour $PM_{2.5}$ primary NAAQS is inconsistent with EPA's risk findings rests on a misunderstanding of those findings. In challenging the 24-hour $PM_{2.5}$ primary NAAQS, CBT largely assumes that EPA can address the risk from daily or short-term peak exposures only through a short-term standard. To the contrary, EPA found that it could most effectively reduce the risks from both long-term and peak $PM_{2.5}$ concentrations through an annual standard of 15 $\mu g/m^3$, together with a 24-hour standard to address unusual circumstances. 62 Fed. Reg. at 38,669. The studies on which EPA relied in setting the standard demonstrated a statistically significant correlation between 24-hour $PM_{2.5}$ concentrations and health effects in cities with annual $PM_{2.5}$ concentrations greater than about 16 $\mu g/m^3$, but did not show such a correlation in cities with annual $PM_{2.5}$ concentrations below that level. *Id.* at 38,676. Thus in setting the annual standard just below that level, *i.e.*, at 15 $\mu g/m^3$, EPA has addressed the statistically significant association between health effects and 24-hour $PM_{2.5}$ exposures demonstrated by the studies in the record. *Id.* at 38,669-38,671. The 24-hour $PM_{2.5}$ primary NAAQS (65 $\mu g/m^3$) serves as an additional margin of safety for localized or seasonal exposures that might not be adequately controlled by the annual standard alone. *Id.* at 38,671.

for this Court to address questions that the court of appeals did not decide. The court of appeals did decide one narrow issue that CBT raises here. The court concluded, over CBT's objection, that EPA may take into account the mitigating effect of the Regional Haze Program in setting the secondary $PM_{2.5}$ NAAQS.

The CAA specifically provides that the purpose of the Regional Haze Program is to address adverse visibility impacts that remain "*notwithstanding attainment* and maintenance of all national ambient air quality standards." 42 U.S.C. 7470(1) (emphasis added). That provision makes clear that EPA is not required to set the secondary NAAQS at a level that eliminates *all* adverse effects on visibility. There is no reason for this Court to review the court of appeals' ruling, which is clearly correct. EPA acted within the scope of its authority in relying on the Regional Haze Program to mitigate some of the adverse visibility effects associated with $PM_{2.5}$. 99-1257 Pet. App. 57a.

CONCLUSION

The conditional cross-petitions for a writ of certiorari should be denied.

Respectfully submitted.

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